

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

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 In re: VEHICLE TRACKING AND) MDL No. 11-2249 (DWF/SER)
 SECURITY SYSTEM ('844) PATENT)
 LITIGATION)
)
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)
) St. Paul, Minnesota
 This Document Relates to) February 1, 2012
 All Actions) 9:00 a.m.
)

BEFORE **THE HONORABLE DONOVAN W. FRANK**
 UNITED STATES DISTRICT COURT JUDGE
 AND BEFORE **THE HONORABLE STEVEN E. RAU**
 UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

PRETRIAL CONFERENCE HEARING

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P R O C E E D I N G S

I N O P E N C O U R T

THE HONORABLE JUDGE DONOVAN FRANK: You may all be seated. Thank you.

ALL COUNSEL: Good morning, Your Honor.

THE HONORABLE JUDGE DONOVAN FRANK: Good morning.

We have a seating chart here that Brenda was kind enough to make, and before we kind of set the agenda this morning, both for those of you in the courtroom and those of you on the telephone, why don't we take a -- we are not going to take literally a walk around the courtroom, but we will go from my left to right, your right to left, if you want to the note your presence for the record and in what capacity you appear. You can start over here and just kind of go left to right.

MR. NICHOLS: Your Honor, I'm James Nichols with Dorsey & Whitney for C.R. England.

MR. LEE: Your Honor, Robert Lee, of Alston & Bird for Coca-Cola, the United Parcel Service and UPS Ground Freight.

MR. CUNNINGHAM: Your Honor, Tom Cunningham, Brooks Kushman, on behalf of Central Transporting, The Mason and Dixon Lines Inc., Great American Lines Inc., and General Motors.

MR. GERASIMOW: David Gerasimow from Fish &

1 Richardson on behalf of Xata, and its customers, as well as
2 FedEx Ground.

3 MR. WILLIAMS: Doug Williams of Barnes & Thornburg
4 and acting in the role as Lead Liaison Counsel for all
5 Defendants.

6 MR. HILL: Steve Hill.

7 MR. KOPPELMAN: Ryan Koppelman, also with Alston &
8 Bird, and also on behalf of Coca-Cola and UPS.

9 MR. RUSNAK: Good morning, Your Honor, Eric
10 Rusnak, of K & L Gates, on behalf of Enfora Inc..

11 MR. BREMER: Good morning, Your Honor, Dennis
12 Bremer of Carlson Caspers on behalf of United Parcel
13 Service, UPS Ground Freight and the Coca-Cola Company.

14 MR. MCGREGOR: Good morning, Your Honor. Leaf
15 McGregor of Fulbright & Jaworski on behalf of USF Holland,
16 Reddaway, Inc., and New Penn.

17 MR. ANDERSON: Good morning, Your Honor, Alan
18 Anderson on behalf of the Plaintiffs. I will introduce you
19 to Bryan Farney of Farney Daniels, also Lead Counsel for the
20 Plaintiffs.

21 THE HONORABLE JUDGE DONOVAN FRANK: Good morning.
22 And I believe there is also, you have a member of your firm
23 who was here the last time on the phone, I believe?

24 MR. FARNEY: Yes, Connie Merriett on the phone.

25 THE HONORABLE JUDGE DONOVAN FRANK: Would those of

1 you on the phone like to, on no particular order, if we can
2 make it work with our particular technology, even though my
3 calendar clerk -- and maybe if everybody but Judge Rau and
4 I, because we have the list up here, if you all knew who was
5 on the phone; but, maybe for the record if you each want to
6 briefly indicate your presence? And then we will go
7 forward.

8 Don't everybody speak at the same time.

9 MR. DOYLE: Your Honor, good morning. This is
10 Scott Doyle and Jon DeFosse from Shearman & Sterling
11 representing Mercedes-Benz USA.

12 MS. MERRIETT: Hi, this is Connie Merriett from
13 Farney Daniels representing the Plaintiff.

14 MR. McCABE: Michael McCabe and John Torkelson,
15 representing ABF Freight.

16 MR. FURTH: My name is Tom Furth with Kudman
17 Trachten Aloe in New York City, representing Brickhouse
18 Electronics.

19 MR. HARRELL: Good morning, Your Honor, Alex
20 Harrell with Brackett & Ellis in Fort Worth, Texas,
21 representing Global Resource Group.

22 MR. WILLIAMSON: Good morning, Your Honor, Nick
23 Williamson with Bryan Cave, representing Defendant SAIA
24 Motor Freight Line, LLC.

25 MS. LAWRENCE: Good morning, Your Honor, Erin

1 Lawrence from Frommer Lawrence & Haug, representing
2 Fleetmatics USA, Inc., Alan Ritchey, Inc., and SageQuest I,
3 LLC.

4 THE HONORABLE MAGISTRATE JUDGE RAU: Did Mr.
5 Doyle --

6 THE HONORABLE JUDGE DONOVAN FRANK: Mr. Doyle?

7 MR. DOYLE: Yes, Your Honor?

8 THE HONORABLE JUDGE DONOVAN FRANK: My Court
9 Reporter just told us that you had noted your presence, so
10 we are good.

11 All right. Have we missed anyone? Well, why
12 don't we -- first of all, some of you are probably thinking
13 but haven't said it, the Order that was entered following
14 this hearing stated that we would start in chambers. And I
15 will take full responsibility for the next time we are
16 together, that is what we will do and the order will specify
17 I think in fairness to everyone, because there won't be -- I
18 thought it wasn't fair to do it today notwithstanding the
19 Order: One, because we didn't make it clear that it is not
20 designed to be on the record or to have, absent some
21 extraordinary circumstance, conference people in on the
22 phone. And so, I found through the other MDLs I have had,
23 especially the Guidant case, that those sessions that
24 usually would be an hour in advance, would be scheduled for
25 8:30 to 9:30, could be, say, 1:00 to 2:00. We are not wed

1 to the morning. We are extremely productive, not only
2 because we -- and both of us would intend to be there.

3 It not only got us to -- got everyone so we knew
4 each other, but there are a lot of things that we can
5 discuss, whether we want to call them big ticket items or
6 concerns. There are some things that lawyers were quite
7 appropriately comfortable saying in chambers and being
8 straight up about some of the difficult issues, or I suppose
9 difficult individuals, frankly speaking. So, I think all of
10 the lawyers involved would say that it was very productive
11 from all the way around.

12 And then it was understood we would follow to the
13 courtroom. It was also understood there was no, don't tell
14 anybody what we said back here. If any lawyer felt
15 strongly, and it happened very rarely, well I want to put on
16 the record something that happened back in chambers. That
17 either happened zero times over a few years or maybe once,
18 as I recall it.

19 So, trying to maximize fairness and not exclude
20 people, and I only had to excuse -- and I won't name the
21 lawyer from Louisiana who I had to escort out of the -- that
22 was uninvited to one of the meetings, but there we had lead
23 counsel because of the -- and liaison committees. So --

24 THE HONORABLE MAGISTRATE JUDGE RAU: But we don't
25 have any difficult people here.

1 THE HONORABLE JUDGE DONOVAN FRANK: No, we don't
2 have any difficult -- well, this individual was -- that was
3 a rare occurrence, and Judge Boylan thought it was only
4 appropriate that since I was the Article III, I would
5 escort -- he said, you just threw that lawyer out of your
6 chambers. But, I think with that rare circumstance, they
7 were extremely instructive, informative, and I don't think
8 any lawyer that you talk to will say there is a downside to
9 those.

10 On the other hand, we won't do them just to say
11 that we did them. The other thing, then I will move on to
12 this agenda and what we hope to accomplish today. The other
13 thing we set up, and I think rather than go over it in
14 detail or even summarize it, I can send you a copy of the
15 Order before we make a decision.

16 We set up a system, and I frankly don't remember.
17 I doubt that it was my idea or Magistrate Judge Boylan's.
18 It probably came from some of the lawyers from other MDLs, a
19 system to expedite the motion practice absent some major
20 dispositive motions so that we could get notice 7 to 8,
21 10 days before the next status conference. Here is what we
22 want on the agenda, here is an issue we can't resolve. And
23 here is our five-page letter brief to say here is what we
24 would like to raise in the courtroom at the next status
25 conference and have a decision from you.

1 And so, we set up a procedure that really, I think
2 all of the lawyers would say, is fair and didn't shortcut
3 anyone. And whether it was a discovery issue or some other
4 issue, it really, I think, moved things along, as opposed to
5 saying, we are now going to have formal motion practice for
6 each and every issue that comes up with all of the notice
7 and the briefing schedules that are necessary.

8 So, I will locate a draft copy of that order that
9 was entered, and it may be fitting to use some part of that
10 here, depending on the response of counsel, it may not. We
11 will soon find out. But, I think the lawyers involved would
12 say it kind of minimized expense, minimized some delay, and
13 as long as everybody played by the same rules, so absent,
14 you know, some formal motion practice on a major issue or
15 issues in the case.

16 As of today, I will make a couple of comments and
17 then see if Judge Rau would like to join in. We are hopeful
18 that before we are done here, we anticipate, unless
19 something happens during the next hour or so that we would,
20 roughly, in two weeks, first we will set another hearing out
21 in the neighborhood of five to six weeks. And we will agree
22 at the end of the hearing on a date, unless there is some
23 compelling reason why not with the understanding that most
24 of these status conferences, if there is no reason to get
25 together, we won't get together, but I suspect there will

1 be. Because what we envision is requiring proposed 26(f)
2 reports within two weeks from today's date, and we would
3 adjust that one way or the other, and I will reduce this to
4 an order, as well.

5 And what we -- after our discussion, maybe some of
6 these things will change, right now we are envisioning a
7 couple of things in light of the agenda you were kind enough
8 to send in. One is, there might be the Defendant saying,
9 once we can decide who we mean by the Defendants, if there
10 is going to be other dismissals or a stay, and who is in for
11 the long or temporary run here, here is what all of the
12 Defendants agree on for 26(f) purposes, and here this
13 Defendant doesn't agree on this piece of it or that.

14 Then the Plaintiffs will say, well, we agree to
15 the following, what the Defendants have come up with, and
16 here are all of the things we don't agree with. So, here
17 are the things we jointly agree on, and here are the things
18 you are going to have to make the call on, because we
19 don't -- we don't agree, either in the order of things or
20 the spacing of things or the scope.

21 So, we are contemplating that no later than the
22 next status conference there will be a -- we will put an
23 order in place, unless something happens where we need to
24 come together on that date, and then an either off-the-bench
25 after-chambers conference in the courtroom the Order gets

1 issued.

2 Now, I am making a couple of assumptions about
3 that and let me make one comment that is indirectly, if not
4 directly, related to the schedule.

5 Obviously, Minnesota is like some other states
6 with a high patent load per Judge; and that is, we have our
7 own forum for patent cases. And whether we have our own
8 forum or not, that is much like a couple of the other major
9 patent districts in the country that has worked quite well,
10 the Bar would say, because they had major input into it --
11 let me just speak frankly. The MDL Panel that sent this
12 here, they made some assumptions, obviously, or it wouldn't
13 have been with or without objections from a number of your
14 clients, wouldn't have been an MDL, so to speak. That there
15 would be some central or in common claim construction
16 issues, some central or common issues in saying here is what
17 we, the plaintiff, mean by -- here is what we claim the
18 infringement is and here is what each defendant has in
19 common and here are the differences. In part we will get to
20 some of that today, because of the January 20th letter, and
21 then I see a supplement letter on the 30th.

22 There is an assumption made by the MDL Panel that
23 I think it is fair to say there would be some global *Markman*
24 hearing that would be dispositive of one or more issues.
25 Because obviously, if the result is, well, there is going to

1 be one *Markman* hearing for the car manufacturers, and then
2 even within that there is going to be -- because the issues
3 of validity and infringement are so varied, that there is
4 really 20 within the one, or five within the one, same way
5 with the other Defendants.

6 I think the issue is, if the MDL Panel, accurately
7 or inaccurately had concluded, well, there is no way around
8 20 individual discovery requests, and maybe I just
9 arbitrarily picked that number -- I could have said 10 or so
10 other number. And in effect, there is going to be, whether
11 you call it one hearing or not, there is going to be a
12 multitude of *Markman* hearings on claim construction issues
13 because the allegations of infringement are so different, as
14 opposed to what they base their decision on there's common
15 issues across the board on the '844 Patent. I don't believe
16 they would MDL it.

17 So, we will soon find out today what the parties
18 think. I will tip my hand on one issue that is not unique
19 to MDLs in claim construction, if that does become a key
20 issue. I think it was assumed once the case came here,
21 because obviously I assumed when I agreed to take the case
22 that some type of, quote, global claim construction hearing
23 would occur where there might be some big ticket items that
24 would resolve some, if not all of the issues for most or all
25 of the Defendants. Otherwise, it kind of defeats the

1 purpose of the MDL, and we will soon find out. And maybe
2 some of you will say, well, it is a little premature to be
3 making those judgments.

4 An issue that may or may not come up, it doesn't
5 have to be decided today. There are some districts -- no
6 Judge in our District has done this that I know of in the
7 numerous hearings I have had believe in the representative
8 term approach to say, you get five terms and that is it, or
9 you get ten terms, that is it.

10 And that is what -- once we exchange claim charts
11 and allegations, if you can't agree on these, quote,
12 representative terms that will be dispositive of some, if
13 not all of the issues, I have never -- we haven't gone that
14 route in our District. I know that a number of Judges
15 around the country have.

16 I don't know if that is going to become an issue
17 here. It may be appropriate for some cases, not others.
18 Lisa, shall we admit? What is the largest one we had, 50
19 some terms?

20 THE LAW CLERK: I think about that.

21 THE HONORABLE JUDGE DONOVAN FRANK: That we
22 foolishly or otherwise agreed to construe. But, anyway, so
23 our goal here today is to set a time frame so we have
24 workable 26(f) reports no later than the next status
25 conference with any additional input, we are going to have

1 an order out. Because I suspect by reading this, that there
2 are some issues that you will agree on, a number that you
3 will not, and I will mention towards the end of the hearing
4 the exchange I had with Judge Lynn on the sealing issue.
5 Because she and I were going to talk in some detail next
6 week on the *Mansell*, the case that -- she is on vacation
7 this week, but we have exchanged e-mails. So, I will touch
8 on that as I said I would in the Order that was generated
9 after the last hearing.

10 Your Honor, would you like to --

11 THE HONORABLE MAGISTRATE JUDGE RAU: Yeah, a
12 couple of things that I would like to see you include in the
13 Rule 26(f) report. One is, you probably all can find the
14 Judge has suggested that he will get it to you, but I am
15 sure that you will be able to find the Order to which he is
16 referring to that was agreed upon in the *Guidant* matter in
17 terms of the informal motion practice.

18 I would like to see if within the scope of your
19 Rule 26(f) report you could collectively agree about how you
20 would do that, and include that within your report ahead of
21 time, so that we can respond to it.

22 Judge Frank has mentioned the Protective Order. I
23 would also recommend that you think carefully, and Judge
24 Frank will probably comment on this, too, about how you
25 proceed will respect to documents that are labeled as

1 confidential pursuant to a protective order, versus
2 documents that are filed under seal.

3 The courts nationally are besieged by sealed
4 documents.

5 THE HONORABLE JUDGE DONOVAN FRANK: We are sealing
6 entirely too many things.

7 THE HONORABLE MAGISTRATE JUDGE RAU: Right. And
8 this is a public court. Unless the document you are filing
9 under seal is protected by statute or decision of law, it
10 shouldn't be filed under seal.

11 Now, if you agree ahead of time to exchange
12 documents and label them confidential for purposes of
13 expediting the discovery between the two sides of the "v",
14 go ahead. But, when it comes to filing documents under
15 seal, if the defendants have designated a document as one
16 that is confidential, plaintiffs want to use it in motion
17 practice, it's plaintiffs' obligation to call defendants and
18 say: Do you think this document when we file it in our
19 motion, or in our informal motion practice requires filing
20 it under seal? If the defendant is the one who has
21 designated the document as a confidential document, the
22 defendant stands on that and that is fine. We don't want
23 you to argue at that point in time. But, rest assured if
24 you are the defendant who has insisted on the document being
25 filed under seal and it doesn't merit sealed filing, we may

1 have some questions for you. So, please don't abuse that
2 part of it. You know, along with the informal motion
3 practice, to the extent necessary, I will also make myself
4 available to resolve these issues within the scope of
5 discovery if you need to. Okay?

6 THE HONORABLE JUDGE DONOVAN FRANK: The other
7 thing, I will send you some language that you are starting
8 to see more and more in -- well, maybe all litigation, not
9 just MDLs. But, I will send some language. You may all
10 agree with it or come up with your own that will expedite
11 any privilege and attorney-client waiver issues, so that we
12 don't get bogged down there.

13 THE HONORABLE MAGISTRATE JUDGE RAU: Right.

14 THE HONORABLE JUDGE DONOVAN FRANK: It is some
15 language that it's a common topic at our MDL conferences.
16 And I will send you some language that a number of us have
17 been using recently to try, for everyone's benefit, but yet
18 to give you the protections that you -- so there is not the
19 "W" word waiver that sneaks up on someone. So, we will send
20 you the language for that. So --

21 THE HONORABLE MAGISTRATE JUDGE RAU: You may
22 include that with any ESI issues that you address ahead of
23 time.

24 THE HONORABLE JUDGE DONOVAN FRANK: So, I think
25 what we would like to do is go down this proposed agenda.

1 And some of this, I think, is quite anticipatory about there
2 may be some things you agree on and not agree on. I will
3 just say most -- and hopefully this is the way it has been
4 for a number of years, not unique to this case and MDLs.

5 One thing that is always in the back of the mind
6 of the assigned Judge or Judges to an MDL case is the
7 criticism by some people on the street and lawyers for
8 certain clients that, well the primary justification for
9 this MDL is to save time and money without compromising
10 fairness to the parties and due process. And if you are not
11 saving time and money and moving things along, there really
12 is no other justification for having a multi-district
13 litigation case.

14 I think there is some significant validity to
15 that. The phrase you will see in the literature is
16 economies of scale, and without compromising the rights of
17 each of your respective clients. So, that is always on my
18 mind, as well, without compromising what the rules
19 contemplate each of your clients is entitled to.

20 So, why don't we do this? Let me ask before we
21 start going down the agenda, start with the Plaintiff, very
22 kind of briefly, and say: What are the most important
23 things, as you -- by the way, for all of you in from out of
24 town, how about this weather?

25 So, if you are hard core northern United States or

1 Minnesotan who wants the cold weather and white snow, I am
2 sorry. But, I don't think there are many of us, probably,
3 in this courtroom, unless you brought your skis along, then
4 you are out of luck, probably. But, yeah, how about this
5 weather?

6 What I would like to do before we kind of go down
7 the agenda and you say what you need to say is, first have
8 the Plaintiffs succinctly as possible say, well, here is
9 what we think the most important thing is to address today,
10 and here is what we were hoping the Court and the parties
11 would focus in on. And then I will do the same for the
12 individual Defendants without argument on the issues, but to
13 say, well here is what we were most hopeful for that we
14 could get accomplished or at least get it to the Court
15 today. So, we will start with Plaintiff.

16 MR. FARNEY: Thank you, Your Honor. It is Bryan
17 Farney for PJC --

18 THE HONORABLE JUDGE DONOVAN FRANK: That podium
19 will go up. There is a button right on the front there.

20 MR. FARNEY: I thought there was.

21 THE HONORABLE JUDGE DONOVAN FRANK: Right on the
22 front there.

23 MR. FARNEY: I was actually going to comment on
24 the weather. I am from Texas. And I have been coming to
25 Minnesota. It seems like every hearing I have ever had has

1 been in the winter. And this is the first time I think I
2 left Texas and arrived here and it was colder in Texas than
3 it was here. That was a first for me.

4 I'm not sure -- it gives me a dilemma, because I
5 told my little boy I was going to Minnesota and it is very
6 cold up there. And then he wanted to know how cold it was
7 when I get back tonight. So, I don't know whether to fudge
8 and tell him it was really cold, or say it was actually
9 colder where you were.

10 The issues that I see, the large issues that I
11 think probably would need to be addressed today, there are
12 three or four. One is the parties have had some discussions
13 back and forth about the infringement contentions that they
14 want the Plaintiffs to provide. And I won't argue the point
15 now, but we believe, and I can explain why when we get to
16 the point, that we will greatly accelerate and make a more
17 complete disclosure if we can get a very minimal amount of
18 information from them before we start. And I will be able
19 to explain that, and I think they will not want to do that
20 and that will be a subject of discussion.

21 The parties have exchanged preliminary 26(f)
22 drafts and I think there's a couple of issues that clearly
23 seem to come out where I think if we present at a high level
24 some of the issues that seem to be in every disagreement, if
25 we get some guidance from you, we may be more likely to

1 agree on a 26(f) report completely, largely having to do
2 with issues about splitting up interrogatories among
3 Defendants and how many third-party depositions, some minor
4 things like that.

5 Then really the third issue is one that just came
6 up right before the hearing. Mr. Cunningham, who represents
7 several parties in the case mentioned to me, as you know --
8 I don't believe they have been transferred to the MDL yet,
9 but PJC Logistics sued a number of car companies, as well.

10 THE HONORABLE JUDGE DONOVAN FRANK: True.

11 MR. FARNEY: And the car companies have asked to
12 be consolidated in an MDL for the efficiency of discovery.
13 PJC Logistics was fine with that. We felt like it made it
14 more efficient. But, there is one issue that has come up
15 that we didn't anticipate, and that is GM has made an
16 allegation that our firm has a conflict with representing
17 PJC Logistics against GM in that particular case that was
18 filed against GM. We don't agree with that, but what we did
19 do just to resolve the matter, the case that is pending in
20 Delaware, we agreed that we would just voluntarily withdraw
21 and let PJC Logistics use a different counsel in that case.

22 And so for purposes of discovery with GM, or
23 whatever may happen with GM, and ultimately if this comes
24 back out of MDL to trial, there would be a different counsel
25 representing PJC Logistics. It doesn't affect the other

1 parties, and it is only related to a GM issue.

2 We believed when we said we were filing the
3 consolidation, that we could consolidate and continue to
4 represent the other parties. We just wouldn't participate,
5 say, in a deposition of GM or any matter that related to GM.
6 We would have other counsel, Mr. Anderson, or someone else
7 handle that. Possibly a third counsel that PJC Logistics
8 might hire.

9 Mr. Cunningham indicated to me just before the
10 hearing that if the matter is consolidated in an MDL
11 inclusive of GM, that GM may try to move to disqualify
12 Farney Daniels from representation of all of the parties in
13 the case. And that would be highly disruptive to PJC
14 Logistics. We have obviously been working on this case for
15 almost a year. We initially sued 243 trucking companies.
16 We have been very active in trying to resolve these matters.
17 We have resolved 203 of the 243 matters. We have reached
18 licenses or settlement agreements or dismissed out 203 of
19 them. And partially settled or dismissed out 20 of the
20 remaining 40 trucking companies. So, we are actually making
21 a lot of progress in reducing the number of parties in this
22 case.

23 And I believe when we get to that issue, I would
24 suggest when we get to the infringement issue, if we get a
25 little information from the Defendants, we will actually

1 resolve a lot more of them. Based on the way things have
2 been going, I anticipate we will have less than half as many
3 Defendants on the trucking side of the case in a month than
4 we have right now. That would be my anticipation.

5 So, my point there is that if there is going to be
6 a motion to disqualify our firm from representing any party
7 in these cases, because GM happens to be consolidated in the
8 MDL, we would feel like that needs to be addressed. And we
9 would not want to --

10 THE HONORABLE JUDGE DONOVAN FRANK: I would think
11 so, yes. Yes. And it sounds like it will come up here
12 before it comes up somewhere else because of the agreement
13 you have in the Delaware case, that it is something that
14 probably should be put at the top of the list for a decision
15 by the Court.

16 THE HONORABLE MAGISTRATE JUDGE RAU: Yeah, how
17 would that look, the proposal that you have, briefly, in
18 terms of separate counsel?

19 MR. FARNEY: Well, in the MDL there will be
20 discovery of each party in terms of their infringing units
21 and their sales, that kind of thing. We would handle all of
22 the other cases, except for GM, someone else would handle
23 that, get involved in that, getting the information about
24 their OnStar units and how many sales they have.

25 Claim construction is to be decided independent of

1 infringement and validity, and so the claim construction is
2 really independent across the parties. We would anticipate
3 largely handling the claim construction, although other
4 counsel might participate.

5 If it then spins back up to trial, we just
6 wouldn't participate in the case against GM. So, we don't
7 see --

8 THE HONORABLE MAGISTRATE JUDGE RAU: You think you
9 have solved GM's problem by simply having separate counsel
10 against GM in this case?

11 MR. FARNEY: Yes. The issue briefly, as I won't
12 go into great detail, is about five years ago there was an
13 attorney named Bonita Lewis in GM who was a friend of mine.
14 And they had a need for counsel in Texas on a case, and we
15 represented them for about five months. We filed an answer
16 in the case based on public information. And then basically
17 nothing happened in the case. There was a Rule 26(f) report
18 and then Ms. Lewis left to go somewhere else.

19 A few weeks later Mr. Simon who replaced her
20 called us. We went up for a meeting to meet him. At that
21 meeting, which neither I or Mr. Daniels really remembered,
22 we met a few engineers or people that were at OnStar. I'm
23 even sure what their role was, for about an hour, got a
24 public tour of the OnStar facility, which was quite
25 interesting, to see all of the lights dotting up across the

1 country, and then a couple of days later Mr. Simon replaced
2 us with counsel he had used, himself. And that was our
3 whole role. We had asked him to identify confidential
4 information, or strategy we received and is very -- other
5 than the fact that we met those people, that was essentially
6 all that ever came up.

7 We didn't want to distract our client, or have the
8 distraction of a fight, or having continued to come up to
9 Delaware when GM looked like a standalone case. So, we just
10 said we will withdraw and let somebody else handle it. But,
11 it would not be reasonable or fair, I think, for our client
12 to be deprived of our services.

13 THE HONORABLE JUDGE DONOVAN FRANK: You are
14 getting into the argument.

15 MR. FARNEY: Then I am stopping now. I was just
16 giving you the high and the low so you understood it is a
17 pretty minimal issue to begin with, so that we don't think
18 it should disrupt the whole MDL.

19 THE HONORABLE JUDGE DONOVAN FRANK: I think the
20 sooner we do it, because I suspect that GM is not going to
21 concede that the claim construction issue, especially if
22 there are some issues in common, which is kind of
23 presupposed until it appears otherwise, probably the sooner
24 we deal with that, the better, for everybody's benefit.

25 MR. FARNEY: I think that is right. And then we

1 might want to address other ways to handle the MDL. For
2 instance, perhaps having a car MDL, a trucking MDL and
3 running them parallel, or something like that.

4 THE HONORABLE JUDGE DONOVAN FRANK: All right.
5 Who would like to -- Mr. Anderson, are you going to jump in?
6 Or are you just going to kind of be --

7 MR. ANDERSON: I can.

8 THE HONORABLE JUDGE DONOVAN FRANK: Pardon?

9 MR. ANDERSON: I can.

10 THE HONORABLE JUDGE DONOVAN FRANK: Okay, all
11 right.

12 MR. ANDERSON: And if there's anything I can -- I
13 would be happy to --

14 THE HONORABLE JUDGE DONOVAN FRANK: All right.

15 MR. ANDERSON: -- join, but I'm fine right now.

16 MR. WILLIAMS: And Your Honor, Alan has a fresh
17 haircut for today's hearing. I ran into him the other day
18 in the skyway and he was getting dressed up for the
19 proceeding.

20 THE HONORABLE JUDGE DONOVAN FRANK: You know,
21 there is a danger in saying that unless you're absolutely
22 positive, and you must have been. Because some people say,
23 thanks for the compliment, I got my hair cut four and a half
24 weeks ago.

25 MR. ANDERSON: Actually, we did run into each

1 other in the skyway and I did tell Mr. Williams I was
2 getting it cut just for Your Honor.

3 MR. WILLIAMS: And we made a joke about my not
4 needing one. So, Your Honor, there are two things we want
5 to address today. Primary things are D and D, discovery and
6 disclosures, are the two big things.

7 And very briefly on the disclosures, we did get an
8 initial disclosure pursuant to the Court's Order on
9 January 20. We had a conversation with them and said this
10 is not working for us, anywhere close. There was a
11 supplement that came in on the 30th to most of the
12 Defendants. And we still believe that we are a long, long
13 way from being able to have anything meaningful so that we
14 can proceed.

15 Now I did hear, and I think we will discuss in a
16 few moments, what Plaintiff would like is -- and suggested
17 that maybe if they can get some preliminary information from
18 us, that would help them move things along. I think we have
19 got to the very big part of the rub, here. That is, what
20 they would like to get informally is the discovery that
21 says -- that should have been done before they filed this
22 lawsuit. And that is, do these people actually have
23 equipment or do they not have equipment? We will talk about
24 this in more detail a little later on. But, basically, we
25 are very concerned that we don't have an adequate pre-suit

1 evaluation of what took place and that this is primarily
2 fishing for information from the Defendant. So, that is one
3 of our big topics is the disclosure.

4 The other one relates to discovery and damages.
5 And I think one of the ways that we can probably resolve --
6 actually, it would go to Your Honor Magistrate Judge Rau's
7 point about the need for filing documents under seal, and
8 all of that. We are going to propose that we reserve
9 discovery on damages until the end of this case. In the
10 event that we don't need to for liability reasons or it
11 settles or anything else, but I think we in doing so are
12 going to talk about this in more detail about why we think
13 it is appropriate. But, the bulk of the kinds of things we
14 would request to file under seal are always the money
15 documents. If we put the money on the back end of this
16 thing we will save a lot of time and we will save a lot of
17 documents being filed under seal.

18 So, those are our two big things. We have got a
19 number of other issues that some of the individuals would
20 like to raise, but I think that is our primary --

21 THE HONORABLE JUDGE DONOVAN FRANK: Well, and
22 maybe we will get into, as we go forward there, is always
23 the issue, since you've raised it -- it wouldn't relate
24 strictly to damages, but something significantly short of
25 using the "B" word, bifurcation, is some type of stage

1 discovery.

2 In other words, one of the criticisms of all civil
3 cases these days is the cost of discovery, itself, becomes a
4 leverage issue because it should be something -- and I think
5 a lot of it falls on the Court, no matter what the case is.
6 There should be something other than an all or nothing
7 approach, quite separate from a formal motion to bifurcate
8 something or stage discovery, so I guess we will talk about
9 that this morning.

10 MR. WILLIAMS: Your Honor, that was our
11 discussion, to substitute the "B" word bifurcation for the
12 "D" word, which was to delay it in this process. That is
13 where we got to. So, we will do a "D" instead of a "B."

14 THE HONORABLE MAGISTRATE JUDGE RAU: Okay. Were
15 there other comments from the Defendants?

16 THE HONORABLE JUDGE DONOVAN FRANK: Or are you
17 going to reserve as we go through some of the individual
18 issues? I will leave that to counsel, here.

19 MR. WILLIAMS: Was there anything else anyone
20 individually wanted to bring up at this point as we walk
21 through this?

22 MR. LEE: We don't need to.

23 MR. WILLIAMS: Okay, we are prepared to start
24 going through the agenda item by item, Your Honor.

25 THE HONORABLE JUDGE DONOVAN FRANK: Well, why

1 don't we do that, unless Judge Rau you have anything else in
2 response to what counsel has said? Why don't we --

3 THE HONORABLE MAGISTRATE JUDGE RAU: No.

4 THE HONORABLE JUDGE DONOVAN FRANK: And again, a
5 lot of people mean different things. Is it useful to
6 discuss, really, number two, first, the pretrial schedule
7 and sequence? Or should we talk consolidation? It means a
8 lot of different things to a lot of different people. So
9 why don't we, because of the General Motors issue and
10 perhaps some others, should we begin with the consolidation?
11 And who would like to step to the podium first? I mean,
12 whatever seems to be -- maybe you have all discussed it in
13 advance. Otherwise, we will just -- we are going to get
14 some good use out of that podium today.

15 MR. FARNEY: I am fine with it like this, as long
16 as I can be heard. Basically, in terms of consolidating in
17 the sense that it means for MDL, that we are going to try to
18 have common deadlines for discovery, and all live by common
19 discovery rules, and so forth, and exchange of different
20 information, and contentions, what have you, we don't have
21 any objection to that.

22 Until this sort of unexpected little issue came up
23 right before the hearing, we just assumed we would proceed,
24 take care of all of the issues and if anybody was remaining
25 in the case at the, sort of, you know, end of the MDL

1 process, they would go back out to their respective court
2 for trial. So, other than this one issue about -- and we
3 have heard Mr. Cunningham. He didn't say, necessarily, they
4 were going to file a disqualification motion, but he just
5 told me briefly that they were thinking about it. And I
6 wanted to make it clear that we weren't consenting to the
7 car companies being consolidated if that was going to be
8 raised. So we are kind of at a tentative stage at that
9 point.

10 THE HONORABLE JUDGE DONOVAN FRANK: Well, and then
11 maybe I will sit tight until we get to 3c on the calendar
12 where it says, "Plaintiff's Proposal for Auto Manufacturers
13 Discovery." Let me ask one question now, because it is
14 likely unrelated to the disqualification issue.

15 Does that imply, since it probably is related, but
16 it does relate to consolidation, when I read this one
17 uniform position on major issues, validity, claim
18 construction, that implies to me that, well, there is at
19 least -- maybe the Plaintiff is of the view, and of course I
20 have seen what the Defendants have said, and we will soon
21 see what they say when we get to that point about
22 individualizing certain aspects of the case. But, that
23 implies to me that the Plaintiff may be of the view that
24 there needs to be one schedule for the car, or the auto
25 manufacturers, with or without separate claim construction

1 issues, assuming that is appropriate or allowed. And one
2 set -- in other words, they set by themselves -- am I
3 reading too much into that?

4 MR. FARNEY: Perhaps.

5 THE HONORABLE JUDGE DONOVAN FRANK: I hope so,
6 actually.

7 MR. FARNEY: Until this issue about the
8 disqualification issue, disqualification thing had come up,
9 we just assumed that, assuming the car companies wanted to
10 do that, we were fine with everybody living by the same
11 schedule.

12 We even understood that they were coming in,
13 because they were coming in a little bit -- a couple of
14 hearings behind, that it might delay things a little bit,
15 and that was okay.

16 THE HONORABLE JUDGE DONOVAN FRANK: All right.

17 MR. FARNEY: We didn't think that was a problem.
18 The uniform position probably should have been a little more
19 clearly stated. What we were really trying to get at is, to
20 the extent all of the Defendants have the same view of a
21 particular claim term, our belief is that it should all be
22 in one brief.

23 We shouldn't get 20 briefs talking about the same
24 term that we have to respond to. If some of the Defendants
25 have a different positions on a term than other Defendants,

1 then I think they are entitled to take that view, but it
2 just should be -- that brief should be on only that issue.

3 So, we might have, Plaintiffs might present one
4 brief in response to their common positions, and then there
5 might be shorter briefs with Defendants that have different
6 views, you know, on one term, we'd will brief that
7 separately.

8 THE HONORABLE JUDGE DONOVAN FRANK: All right.

9 MR. FARNEY: But not have, you know, 50 people
10 piling on to the same term on the Defendants' side on the
11 same construction position.

12 THE HONORABLE JUDGE DONOVAN FRANK: And then we
13 will get to that. All right.

14 MR. FARNEY: But certainly consolidation, I think
15 we understood there to be consolidation.

16 THE HONORABLE JUDGE DONOVAN FRANK: Why don't we
17 hear from the Defendant or Defendants on the consolidation
18 issue, if there is anything on that issue as he set out the
19 concern that the Plaintiff has. I guess it does come back
20 to the, at a minimum, the disqualification issue and perhaps
21 others.

22 MR. WILLIAMS: Mr. Cunningham will speak on behalf
23 of that issue.

24 THE HONORABLE JUDGE DONOVAN FRANK: Certainly.

25 MR. WILLIAMS: He represents General Motors.

1 THE HONORABLE JUDGE DONOVAN FRANK: All right.

2 MR. CUNNINGHAM: Your Honor, first off, I think
3 the -- I'm not sure about all of the car cases, but I think
4 at least the OnStar General Motor case was transferred
5 yesterday by the Delaware Court. The Conditional Order was
6 entered on Monday. And I believe that case has already been
7 transferred.

8 I am not sure about the other automotive cases.
9 They are all before the same Judge, so I imagine those may
10 have already been transferred, as well. They may already be
11 here. So, for the purposes of going forward, I think
12 everybody is probably in the same boat at this point.

13 THE HONORABLE JUDGE DONOVAN FRANK: All right.

14 MR. CUNNINGHAM: To just quickly address, we might
15 as well do it now, the conflict issue, I did inform Mr.
16 Farney that GM was considering it. Mr. Farney did
17 representing GM in a patent infringement case on the same
18 accused system in 2008 -- I believe it was 2008, 2007 or
19 2008, and had access to a lot of GM confidential
20 information.

21 And we basically told them that we felt they can't
22 go forward. And they did withdraw from the other case. Now
23 that the case has been consolidated, we have concerns with
24 them being on the other side, and things that you brought
25 up, claim construction, joint document requests. He knows

1 what documents we have, what systems we have. He is privy
2 to all of that stuff. He knows all of the witnesses we have
3 relating to OnStar and a lot of our strategies. And we are
4 just concerned with that. We are looking into the issue
5 because this is a new issue for us. And it may be a novel
6 issue in regard to MDLs. We are looking into the case law
7 right now and we should be able to let the Court know how we
8 are going to proceed fairly soon. But, I wanted to bring it
9 up because it is a global issue that could affect the whole
10 thing.

11 THE HONORABLE JUDGE DONOVAN FRANK: Yes, it could.

12 MR. CUNNINGHAM: So, I wanted to bring it up.

13 THE HONORABLE MAGISTRATE JUDGE RAU: It seems to
14 me you do need to sort of cross that bridge probably earlier
15 than almost anything else, because at least from the
16 perspective of this Judge, it greatly affects PJC's right to
17 counsel of its choice in this litigation. After all, it is
18 someone else who has decided that this should proceed in
19 this fashion. I would tread a little lightly -- Judge Frank
20 is going to make the decision on interfering with that right
21 because the courts have said this is the way you are going
22 to do it.

23 THE HONORABLE JUDGE DONOVAN FRANK: Well, here is
24 what we will do. I mean, the ideal situation would be --
25 let's just say, for whatever reasons, your client with your

1 advice decides we are going to bring the motion. We are
2 obligated to bring the motion. And separate from what the
3 consequence of the motion could be, because I suppose it
4 could be everything from the entire disqualification to
5 something less than that. But, the motion should still be
6 brought sooner, rather than later. Do you think you will
7 have an assessment within the next two to three weeks of,
8 well, no, we are not bringing it, or yes we are?

9 MR. CUNNINGHAM: Yes, Your Honor.

10 THE HONORABLE JUDGE DONOVAN FRANK: Well then what
11 I would suggest, and maybe I will just make a note of it
12 without going into any detail in the Order that comes out of
13 here, that if I would direct that the Court be contacted
14 with notice to the other parties of what your position is,
15 and then with or without agreement it seems to me that we
16 wouldn't have to wait for the next hearing to set a
17 schedule. We can try to -- and I don't know if any of the
18 other Defendants will take a -- and say, well, wait a
19 minute. We are going to want to get in on this as well and
20 submit a brief. But, we could agree on some expedited
21 schedule, as long as neither side thinks that we are, you
22 know, cutting corners. So, with or without oral argument,
23 probably with, because we are an oral argument District,
24 unless the parties stipulated; but, even then I think we
25 would want oral argument. We could take that up as soon as

1 possible.

2 Even if it means the decision is we are going
3 forward and whether your request is going to be complete
4 disqualification or there are some other issues, even if it
5 means a short telephone conference just with a couple of you
6 to say, let's agree on an expedited briefing schedule so we
7 can get this heard and decided, and so the Plaintiff can
8 make some decisions, that is what I think we should do. So
9 -- does that seem acceptable? Of course, probably the
10 sooner we do it for everybody's benefit, the better.

11 MR. FARNEY: Yes, Your Honor.

12 THE HONORABLE JUDGE DONOVAN FRANK: All right. Is
13 there any -- oh, I'm sorry.

14 MR. WILLIAMS: Your Honor, the other Defendants
15 have not had an opportunity yet to discuss how that issue
16 may impact them, so we will take that up at our regular
17 meeting on Monday and discuss it. So in the event there are
18 going to be some concerns, we will get started on looking
19 into that, as well.

20 THE HONORABLE JUDGE DONOVAN FRANK: We will just
21 be sensitive to the fact that in the event -- and I am sure
22 that one or more of you are hoping it doesn't happen, but in
23 the event that the decision is made by GM to file the
24 motion, and in the event that one or more of the other
25 Defendants say, well, wait a minute, they may have a

1 schedule, but we think we ought to be able to submit and
2 have some input into this with or without additional
3 argument, we will just agree that whether that means a short
4 telephone conference or something, we will respond to it so
5 we can get some schedule in place.

6 In other words, you won't hear from us, we don't
7 want to hear about it. We will take it up at the next
8 status conference and wait until sometime then or after to
9 set up a schedule, unless there is some compelling reason to
10 do it as soon as we hear, because I'm sure some of your
11 co-counsel don't know what they are going to do until they
12 see what the issue is.

13 MR. WILLIAMS: That is correct, Your Honor. Also,
14 on the point of consolidation, I believe there was one or
15 more of the auto companies have counsel that are on line on
16 the telephone today --

17 THE HONORABLE JUDGE DONOVAN FRANK: I think they
18 are, too.

19 MR. WILLIAMS: So, I don't know if whether there
20 was any comment from them with respect to the Auto
21 Defendants that are in. With respect to the Trucking
22 Defendants, collectively the trucking Defendants concluded
23 it makes the most sense to in fact have them all here. And
24 now they have been in effect conditionally transferred here.
25 I think there was a couple of gentlemen from Shearman &

1 Sterling on behalf of Mercedes-Benz. Maybe they will have
2 something to offer on that point, and I don't know if any of
3 the other car companies are on line or not.

4 THE HONORABLE JUDGE DONOVAN FRANK: To the extent
5 there are counsel on line for one or more of the car
6 companies, do you want to briefly state, if you know, what
7 your position is? Or say, please stand by, because we will
8 take a position once we get the position of GM? Anybody
9 wish to say?

10 MR. DOYLE: Well, Your Honor, good morning. This
11 is Scott Doyle from Shearman & Sterling. I have to say, we
12 are primarily listening in today because we haven't even
13 answered a complaint in this case. And now we have been
14 transferred. So there are many issues that are being
15 discussed today that frankly we are not aware of and we have
16 not had any time, whatsoever, to investigate some of these
17 issues.

18 So, I don't think we can dare say at this point
19 whether we are, you know, necessarily objecting to these
20 consolidation points or not.

21 THE HONORABLE JUDGE DONOVAN FRANK: Fair enough.
22 I probably -- obviously as a courtesy, we let people listen
23 in and call in. So that probably wasn't a fair question, a
24 fair question by me. And frankly speaking, if you did say
25 something given your new arrival to the case, I couldn't

1 fairly hold you to it, anyway. So, but at least you are
2 aware of the issues, so we will assure everybody you will
3 get your -- in other words, you won't hear about something
4 happening after it has already been decided, you will hear
5 before.

6 So, if somebody wants to seek input, you can seek
7 the input, and then we will either say, yes, we will hear
8 from you, or no, we won't. So, at least everybody is aware
9 of it, because I think we can do that without delaying
10 anything and letting the parties that are interested proceed
11 so this issue can be decided.

12 Anyone else that is here on that issue?

13 MR. WILLIAMS: I was just going to add, Mr. Doyle,
14 this is Doug Williams of Barnes & Thornburg. If you would
15 like to get in touch with me, I can sort of get you up to
16 speed in advance of our next meeting, which is Monday, to
17 let you know what we have been doing thus far in the case
18 here in Minnesota.

19 MR. DOYLE: Fabulous. Thank you, Mr. Williams. I
20 look forward to speaking to you about that.

21 THE HONORABLE JUDGE DONOVAN FRANK: Who would like
22 to step up on the pretrial -- the D and D, that it has been
23 characterized by the Defendants, anyway? Discovery and
24 disclosure? And of course, it is now said in the context
25 that unless one of you persuades us that it is not a fair

1 thing to expect, we would like to get, with or without some
2 additional guidance from us today, a proposed 26(f) on what
3 you agree on and what you don't, so we can no later than on
4 or about the next conference, which we will set hopefully
5 sometime in March, I know there is a lot of vacation for
6 those of you young enough to have children taking breaks and
7 so forth. We will try to accommodate everybody's schedule
8 to the extent possible when we set the next date, because it
9 is a busy time for a lot of families. So, we are hopeful
10 that we can move down the road on this. But, let's hear
11 from Plaintiff's counsel first.

12 MR. FARNEY: Sure, Your Honor. Some of the
13 Defendants have, as Mr. Williams alluded to, have raised the
14 issue of whether we did an adequate pre-filing
15 investigation, and our request with some information to give
16 them a more complete infringement contention.

17 Let me just briefly address that. The patent, at
18 a high level, while it has a little more language than this,
19 basically covers systems that include an input module that
20 would monitor an event or a condition of a vehicle, which
21 could be any number of things the patent describes. It
22 could be whether the vehicle is started or stopped, or how
23 fast it is going, or whether it is turning or even engine
24 conditions, or any kind of event or condition that could
25 relate to a vehicle. And then a GPS signal coming in so

1 that it knows its location. And then a cellular
2 transmission device that would transmit that information
3 back to some home place or some monitoring system.

4 In simple terms, you can -- you know, one of the
5 examples would be that you could have this system and you
6 could be at a home office and you could watch your truck
7 driver as he is speeding, is he off of his route? If you
8 are monitoring the oil temperature or the engine running
9 rough, or whatever you want to do; that is basically what
10 the system requires.

11 So, the infringement occurs if you have something
12 that monitors the condition of the vehicle which includes
13 starting, stopping, where the vehicle is located, where it
14 is headed, where it has turned, so forth, and its location
15 at the moment, GPS location, and transmits that with a
16 cellular system, a cellular system instead of a satellite
17 system, which there were systems sort of like this with
18 satellites prior to the patent.

19 So, to identify infringers, we did several things.
20 We had several consultants, and in fact the owner of PJC
21 Logistics has been in the trucking business for 25 or 30
22 years, and very familiar with these kinds of systems, as
23 well. He was one of the early adopters of some of these
24 systems.

25 We had them in many cases physically observe

1 trucks. What they were looking for was that a GPS antenna
2 and a cellular transmitter, all of the experts, including
3 the owner, were well aware that if they had that on the
4 big -- we are talking 18-wheeler trucks, then they were
5 almost certainly using a system that was sending back
6 information about a vehicle condition and its location back
7 to some home office or monitoring system.

8 We also looked at some of the manufacturers or
9 many of the manufacturers of these types of systems, many of
10 which listed some of their customers, and said that we are
11 proud that trucking company X is using our, you know, model
12 Y system.

13 We also monitored the trucking websites, some of
14 whom promote the fact that they have these fleet tracking
15 systems so you can keep up with your packages or so that
16 they can have more efficient delivery. So, using that, we
17 then identified the people who had the basic elements of the
18 patent and that is who we sued.

19 Now, the accuracy of the system is proven in the
20 results. Of the 243 trucking companies we identified,
21 203 -- there are a few that just defaulted, so you really
22 can't count them, but a total of 203 are out of the case and
23 had such systems with a couple of exceptions that I will
24 mention in a minute.

25 Of the remaining 40 trucking companies that remain

1 in the case today, 20 of them had infringing systems that
2 have since settled out and been licensed. So, there is only
3 20 of the remainder that are still out there not
4 conclusively resolved one way or the other.

5 So the system -- our system of identifying
6 infringing units was very accurate. The only exceptions
7 came about in three places. One, it turned out that
8 Qualcomm who is a big manufacturer of these systems had one
9 type of system that had an antenna that looked like -- very
10 similar to the cellular transmitter, but it was a satellite
11 transmitter, and there were a few trucking companies that
12 used those, and once that was identified to us, we just
13 dismissed them out promptly. The second situation was there
14 were a few companies that had indicated they were using
15 these systems, but when we actually filed the suit against
16 them and talked to their counsel, their inhouse people, it
17 turned out they had ceased using them quite a long time ago,
18 or at least before we filed suit -- maybe not a long time
19 ago. And we dismissed them out, as well.

20 And then there were a few where we misunderstood
21 the truck was owned by a subsidiary or the parent or
22 vice-versa. In a couple of occasions, it was Allied Freight
23 Lines versus Allied Van Lines. But, other than those
24 earlier exceptions, the only other party we sued or settled
25 out, talked to us -- had a system that monitored a vehicle

1 transferred it back using a cellular transmitter just like
2 the claims require.

3 There is another claim that adds that a condition
4 of it running for operator input, which could easily be
5 simply a help button, or it could be typing messages back.
6 And in fact all of the same systems also had that, as well.

7 So, the issue, though, is this. There is about, I
8 think, 27 manufacturers of these systems in the United
9 States. The antennae they use are not -- are very similar.
10 So, while we could tell you this trucking system has a GPS
11 antenna, has a cellular system, and based on expert advice
12 they are using the system like the patent, a fleet tracking
13 system. We may not know if it is a Xata system or a
14 Fleetmatics system, or some other company's system. You may
15 not be able to tell that from visual observation. So, for
16 the manufacturers who remain in the case, we can provide
17 contentions, because we have information about their systems
18 and we can tell you. I would expect what you will find out
19 is that 99 percent of the trucking companies' units that
20 remain in the case are one of those systems.

21 So, when we provide contentions from the
22 manufacturers, we are providing contentions for the trucking
23 company. But in a particular trucking company's case, we
24 may not know whether they are using the Xata system, or like
25 I said, the Fleetmatics system. So, if they want

1 contentions specific to them, all we need is what brand of,
2 you know, trucking company you are using, and then we can
3 tell you, refer to the Xata system contentions. That is
4 really the only issue.

5 The second issue that I would say is, when we
6 settled with Qualcomm there were a number of companies that
7 we had sued that were 100 percent Qualcomm customers. That
8 is all they used. So, when we settled out with the Qualcomm
9 as a manufacturer, that settled out those Qualcomm trucking
10 companies.

11 There were some companies that used some Qualcomm
12 units and some other units. So, we wrote letters to all of
13 those companies and said, you should be aware that we are no
14 longer pursuing or asserting any case against the
15 Qualcomm-related units. But your counsel has indicated you
16 have additional fleet trafficking units. If you will
17 provide us information with that, we can give you -- in some
18 cases your manufacturer's or other units may be licensed, in
19 which case you are out and we just don't know it, or you are
20 going to have very small numbers.

21 And in many of these cases that we found so far
22 where they were partial Qualcomm users. The amount of units
23 they were using weren't Qualcomm, or were very small. And
24 we were able to settle out for very nominal amounts with
25 those people.

1 I suspect there are 40 remaining trucking
2 companies, 20 are partial Qualcomm users. That is why I am
3 saying before, if we can simply find out the number of units
4 they have that weren't Qualcomm units, it could be really
5 small amounts, in which case we might just let them out, or
6 it could be really nominal settlements. We just don't have
7 that information.

8 So, if they want contentions by company, what we
9 just need from them is what brand of unit are you using, and
10 you know, we think it would be useful for the Court to help
11 efficiently get rid of a lot of these Defendants out of the
12 case, to know the units. That is not relevant to
13 contentions, but --

14 THE JUDGE DONOVAN FRANK: Is there a reason that
15 the focus -- and maybe I will use the wrong words here -- is
16 on something other than -- in a common case you will see
17 almost always the manufacturers present, and depending on
18 the size and nature of the supplier and their involvement
19 with the manufacturer, you may see suppliers, quite unusual,
20 at least at the claim construction stage to see the end
21 users battling out claim construction issues. And maybe
22 that is not what you mean by saying these different
23 companies, the trucking companies.

24 MR. FARNEY: Yes. The reason is this. We
25 originally brought the action against only trucking

1 companies and not the manufacturers. And that was because
2 we have a different damages theory that would relate to the
3 trucking companies, rather than to the manufacturers. And
4 PJC as the patent owner is entitled to seek its royalty from
5 whichever party it wishes. The case law is clear on that.

6 And we felt like we were -- we had a better
7 royalty model, a more advantageous royalty model with
8 respect to the users of the device and the savings they make
9 from using this device than the manufacturers.

10 What happened when we sued the trucking companies
11 is a number of the manufacturers DJ'd us, essentially came
12 into the case on behalf of their customers and got
13 themselves into the case.

14 THE HONORABLE JUDGE DONOVAN FRANK: Which isn't
15 unusual to see.

16 MR. FARNEY: That is right. But, that is how most
17 of them got in here.

18 Later some additional manufacturers -- we became
19 aware of some additional manufacturers during the process
20 that were not as well known. And since we already had some
21 of the manufacturers in the case, we just felt it was better
22 just to have them all in the case. But this sort of relates
23 to an issue that is going to come up in a little while,
24 whether we stay as to the trucking companies and go only as
25 to the manufacturers, and we would be strongly opposed to

1 that because the damages model we ended up pursuing in the
2 case is really related to the trucking companies' savings
3 realized from using these systems, more than the
4 manufacturer's sales.

5 THE HONORABLE JUDGE DONOVAN FRANK: Well, why
6 don't I -- I think it might be more useful to see how many
7 different positions there are. And I am looking actually
8 now to not just 2, but part of 3, and then what some of the
9 Defendants agree on and what maybe the Plaintiff does, and
10 then we will take it from there, Judge Rau? All right?

11 MR. WILLIAMS: Your Honor, let me begin by going
12 back to the original Qualcomm Declaratory Judgment action
13 that was filed. I did file that on behalf of Qualcomm. And
14 a statement that was made that I believe that was at least
15 inferred that Qualcomm had settled because they were
16 infringing and had acknowledged that, that was not the case.
17 That is not the basis for their settlement, nor was there an
18 acknowledgement of --

19 THE HONORABLE JUDGE DONOVAN FRANK: He is trying
20 to get your attention.

21 MR. FARNEY: I apologize. I apologize. I should
22 have been clearer. There was no admission in any of those
23 settlements that anybody infringed and I didn't mean to say
24 that. What there was, was there was a discussion that they
25 had, at a high level, the monitoring of an event and a

1 cellular transmission --

2 THE HONORABLE JUDGE DONOVAN FRANK: All right.

3 MR. FARNEY: I didn't mean to imply that anybody
4 admitted infringement by settlement. I didn't clarify that.

5 MR. WILLIAMS: And I accept that. Which brings me
6 then to the antenna issue. And the question that we have
7 got, and the real problem that we have as a group of
8 Defendants, we just heard now that one of the things they
9 did, not for all of the trucking companies that had been
10 sued, is look at the top of the truck and see if it had two
11 antennas, a cellular antenna and a GPS antenna.

12 Well, they looked at a bunch of the Qualcomm ones,
13 and the Qualcomm had this universal kind of antenna which
14 could work for -- and when I was out there meeting with them
15 and going through all of that, I said: What is this one
16 for? And I said: That looks like a GPS locational -- no,
17 no, that is HD TV for the driver. So, in the back end they
18 have one so they can get an HD TV in the back of their
19 little extended cab things.

20 So, there are a lot of uses that these antennas
21 can have that are not infringing. And to simply go and to
22 take a look and say, well, if you have two antennas, then it
23 could be that you infringe. So, I am going to sue you and I
24 am going to find out if you do.

25 And the way we see that, we are not even close.

1 We are not even close to an adequate Rule 11 basis to bring
2 an action if that is all you have done. Here is an example.
3 My iPhone -- some of the folks thought this wasn't a great
4 one. I thought it was a good one. My iPhone has a GPS
5 antenna and it has a cellular antenna. Now, if I stick this
6 with duct tape to the windshield of my Kenworth --

7 THE HONORABLE JUDGE DONOVAN FRANK: Do you have a
8 Kenworth? I can't picture you driving an 18-wheeler. I
9 shouldn't have said that.

10 MR. WILLIAMS: It kind of looks like a Kenworth if
11 you really jack it up.

12 THE HONORABLE MAGISTRATE JUDGE RAU: Oversized
13 tires.

14 MR. WILLIAMS: So, my hypothetical Kenworth, if I
15 stick it up there, then that would be an infringement.
16 There is a lot of other reasons why that may not infringe.
17 In fact, the two things may not be communicating, sending
18 information back about location. It may be that some of
19 these trucking companies are only using their GPS for
20 locational information for the driver. And they may use
21 their cell phone antenna for nothing more than voice
22 communications.

23 It certainly would not be enough for any Judge to
24 authorize a search warrant to do that, and it certainly
25 isn't the basis for a civil litigation, either, just to say

1 you got two antennas up there, so we will invite you in here
2 and then ask you informally, well, you know, do you
3 infringe? So, that is a real issue.

4 It may be that the only way that we get to that to
5 resolve it is the Court may have to take a look at in detail
6 what that pre-suit investigation was, and then first
7 conclude, is that sufficient for you to bring these people
8 in here and start conducting discovery. I mean, it is a
9 real serious issue as to whether or not you have got enough
10 information to be able to do that.

11 THE HONORABLE JUDGE DONOVAN FRANK: So, what do
12 you say? And maybe when I say you, you will say, well, this
13 is what I say, but that doesn't mean the group is on the
14 same page.

15 What are the way or ways, in addition to what you
16 just said looking at the pre-suit discovery, what are the
17 ways that we could resolve that? And, you know, you talked
18 about this earlier and the Plaintiff has made a brief
19 response. What do you say are the best way with or without
20 court involvement? It may well be with, we may soon find
21 out, to resolve that issue -- because what you are both
22 implying is, well, apart from whether some of the Defendants
23 should have been sued or not, and the Rule 11 implications
24 if some of the information is exchanged, some of these
25 Defendants may fall off that are still there, may fall off

1 or have such minor cases that they will be gone before long.
2 But, you don't have the information to make that decision.

3 Now, the Plaintiff is trying to get in here, too,
4 so why don't you just stay right there?

5 MR. FARNEY: What I have been saying is, there is
6 an issue that we have, setting aside the antenna issue --

7 THE REPORTER: Could you come to the podium?

8 MR. FARNEY: The only comment I was going to make
9 is that, as I mentioned earlier, we had a few Defendants
10 that indicated to us that they no longer use the units, that
11 they may have earlier, but they did before we filed suit.
12 And all we have done with those kind of Defendants is said,
13 sign a simple declaration that says you don't have a system
14 that does the fleet tracking steps discussed, and we dismiss
15 you out.

16 If they are really saying, and maybe they are. I
17 don't think they are. If they are really saying, look, we
18 don't use fleet tracking systems, or maybe we have these two
19 antennas, but our antennas don't talk to each other. If
20 they simply want to call us and tell us that and sign a
21 declaration under oath to that effect, we will dismiss them
22 out. We are not trying to keep them in if they are not
23 using it. But none of them are saying that to us yet. It
24 is really a matter of them, you know, knowing that they have
25 them, I think, and simply trying to do this procedural

1 barrier. But, if they really don't have them, tell us and
2 we will drop that immediately. We have done that with the
3 parties who have told us that.

4 THE HONORABLE JUDGE DONOVAN FRANK: Mr. Williams,
5 back to you, whether it is in response to that or to carry
6 on with what you were saying?

7 MR. WILLIAMS: The question was asked, what else
8 can we do that would help get us there.

9 THE HONORABLE JUDGE DONOVAN FRANK: Yes.

10 MR. WILLIAMS: And I think that we do have one
11 piece, and that would be to give us a detailed claim
12 analysis of what it is that they say their patent covers,
13 and then which piece of equipment, you know, from which
14 manufacturers, you know, how does it relate to those pieces?
15 I think that would be a starting point.

16 Now, there is -- I think maybe Mr. Bremer or Mr.
17 Lee might want to address -- they do have a pending motion
18 that is before the Court that has been taken off for
19 hearing, but they may want to address that more specifically
20 as to what they feel they need. And you -- yeah.

21 MR. LEE: Your Honor, I will make a couple of
22 quick comments to that effect. As you recall, we did file
23 these motions, I guess, for a more definite statement.

24 THE HONORABLE JUDGE DONOVAN FRANK: You did.

25 MR. LEE: We took them off calendar agreeing to

1 what we laid out, I thought pretty exhaustively, in our last
2 conference, a procedure by which we would be informed of
3 what systems we use or what systems are alleged to infringe.
4 The practical reality is we are not much further along than
5 where we were.

6 We did get a letter late on Monday which basically
7 said: We are looking for these types of systems. If you
8 have one, let us know. And I have not yet had a chance to
9 discuss that with my client if they had these types of
10 systems. But it is, literally, an identification of here is
11 what we looking for. Here are the types of companies or
12 manufacturers that we think may be involved in this.

13 We don't know what you do or what you have, but if
14 you have some of this, come talk to us. And you heard
15 counsel: Give us the numbers, and we will settle you out
16 real cheaply. So, fundamentally, we have got two problems.
17 It is a chicken or an egg sort of thing.

18 The concern we have is this Plaintiff wants to get
19 to court, in effect, to just turn potential settlements
20 cheaply to get people out, versus adequately investigating
21 claims and bringing a legitimate infringement claim. So now
22 we are looking at it from a position of, we are bidding
23 against ourselves. We go to them and say: Here is what we
24 think you may be interested in, and here is what, you know,
25 we then think we want to now put into the case because you

1 have generally alleged, these are the types of things you
2 are looking for and we hope you have one. But, we are
3 sitting here today and I am not in a position where I can
4 say honestly on the record my clients have one of these or
5 not. Because we have heard about the first time in writing
6 what it is they are looking for.

7 We filed our motions, their pleadings doesn't have
8 it, their Complaint doesn't have it. Maybe it is
9 appropriate for them to have to amend their Complaint to put
10 these more specific, but still factually generalized
11 allegations in their pleadings. So, we are in the process
12 of investigating that. But, you have heard counsel, once
13 you figure out what it is you have and how many you have,
14 come tell us and we will figure out a number and everybody
15 will go away. And fundamentally we have a principal problem
16 with that, coupled with we are now just learning this
17 information and we are now in the process of investigating
18 it.

19 Today I am not going to say we are ready to put
20 our motions back on the calendar, but we have got concerns
21 that I have to talk to my client about and work through that
22 just in the last day we have been unable, given the travel
23 up here yesterday, as well, it's hard to get through.

24 MR. FARNEY: Your Honor, I would like to speak to
25 that, just briefly.

1 THE HONORABLE JUDGE DONOVAN FRANK: Mr. Farney?

2 MR. FARNEY: I think it is very important. And I
3 am glad Coca-Cola's counsel spoke, because I think it
4 highlights the disingenuousness of what is going on.

5 We sued Coca-Cola and told them that your
6 infringement is using fleet tracking systems that have these
7 kind of features. As I mentioned to you earlier, we can't
8 necessarily know which brand they are using, but we can tell
9 they are using a brand.

10 Coca-Cola had, after we filed suit, had
11 indemnification discussions with Qualcomm about the Qualcomm
12 units that Coca-Cola was using to discuss getting out of the
13 case. So, Coca-Cola didn't have a problem knowing
14 immediately what we were talking about in this suit, and
15 immediately what units we were talking about. And in fact,
16 Coca-Cola is out with respect to the Qualcomm units. So,
17 they know there is a fleet manager in these big fleets. One
18 call to the guy that runs the fleet system to say, tell us
19 which companies we're using, and they will know.

20 What we sent them was a list, as what we said we
21 know. We know you are using systems, we know from your own
22 counsel that you are using systems other than Qualcomm
23 because they told us when they settled out Qualcomm they are
24 using other systems other than Qualcomm and you shouldn't
25 dismiss them out entirely. We just don't know which ones

1 they are. But for them to act like, well, we have no idea
2 what they are talking about and we have no way to find out
3 what this is, and we don't know how they even possibly sued
4 us is ridiculous. Because Qualcomm, they immediately
5 started talking to Qualcomm and we settled Qualcomm out.

6 This is not a matter of, I should add, of us
7 saying, oh, we are just suing you. We are going to try to
8 settle up here for a nuisance amount.

9 There are parties in here who have paid millions
10 of dollars in royalties recognizing this patent as a
11 valuable, fundamental patent in the fleet tracking world.
12 When I mentioned that we have settled out people for small
13 amounts, it turns out that there were trucking fleets who
14 were 95 or 98 percent Qualcomm.

15 And once you settled with Qualcomm, and they were
16 out, they had maybe 50 trucks left. Or they had tried some
17 other companies' units on a test basis, or 100 trucks, or
18 something like that. So, we settled them for small amounts.

19 THE HONORABLE JUDGE DONOVAN FRANK: All right.

20 MR. FARNEY: That is the small settlement amounts.
21 There are some parties here right now in this case that
22 have, from what we can tell, their entire fleet size is 100
23 trucks or 200 trucks or 500 trucks.

24 It would be true that if they talked with us, the
25 settlement would be small amounts. But, it is not because

1 we are settling out on nuisance amounts. There's also
2 parties here with tens of thousands of trucks, and that is
3 not going to settle for, you know, low amounts of money.

4 So, this is not a nuisance settlement where we are
5 suing a bunch of people and trying to roll them out without
6 discovery kind of case. And I kind of resent that
7 implication. They all know better than that. And they also
8 know exactly what units they have that are accused. Just
9 like Coca-Cola knew and knows what units it has when it went
10 and talked to Qualcomm after we filed our supposedly
11 generalized complaint. That is what is going on.

12 THE HONORABLE JUDGE DONOVAN FRANK: All right.
13 Before we take a recess, and then we'll proceed and finish
14 up, let's let both Coca-Cola's counsel and anyone else who
15 wants to address this issue say what you -- come on up,
16 counsel. And then we will take the recess. And we will
17 have a plan of action as we recess later this morning that
18 will address this issue. So --

19 MR. LEE: Counsel is correct. Coca-Cola was at
20 one point represented by counsel for -- who was put into the
21 case by Qualcomm. When Qualcomm says we are going to engage
22 on this issue, we identify you as one of our customers, so
23 we are going to handle any litigation relating to any
24 equipment you have of ours.

25 As counsel noted, I don't think there was any

1 discussion or admission of infringement, or that even these
2 systems practiced these claims. But, Qualcomm protected its
3 interests and protected its clients. And Coca-Cola was
4 protected to that point, for whatever Qualcomm was doing.

5 But, sitting here today, Qualcomm is gone. So,
6 presumably any other allegations extend to whatever else we
7 are doing. And we are still in a position of -- we didn't
8 understand that the Qualcomm issues were involved directly.
9 Qualcomm came to us, put themselves into it and resolved
10 themselves. And now we are left with what else is left.
11 And that is what we are continuing to investigate.

12 THE HONORABLE JUDGE DONOVAN FRANK: All right.

13 MR. LEE: We are looking at these issues, Your
14 Honor. I mean, Counsel gave us this information on
15 Monday --

16 THE HONORABLE JUDGE DONOVAN FRANK: I want to hear
17 the rest of the Defendants, first.

18 MR. LEE: Counsel gave us this information on
19 Monday --

20 THE HONORABLE JUDGE DONOVAN FRANK: All right.

21 MR. LEE: And we are looking into it to see. But,
22 again, it is also a principle position we are taking, Your
23 Honor.

24 THE HONORABLE JUDGE DONOVAN FRANK: Come right up.

25 MR. HILL: Your Honor --

1 MR. WILLIAMSON: Your Honor, this is Nick
2 Williamson on behalf of SAIA Motor Freight Line LLC. May I
3 speak?

4 THE HONORABLE JUDGE DONOVAN FRANK: All right.

5 MR. WILLIAMSON: I would just like to add that in
6 response to Plaintiff's argument, I think what they are
7 saying is really flipping the script here, Your Honor.

8 The problem that we have is with not necessarily
9 our understanding of what their allegations are, but with
10 what their understanding was and whether that was reasonable
11 in terms of a pre-filing investigation. And what the
12 Federal Circuit has said in the *View Engineering versus*
13 *Robotic Vision Inc.* case is that a prospective plaintiff has
14 to actually compare each specific subsequently accused
15 product to the patent claims to analyze infringement before
16 filing suit. And here we think there are real questions
17 about PJC's ability to do that simply by looking to see
18 whether or not there is an antenna on top of a cab. And
19 that in turn impacts our ability to substantially defend our
20 case because we don't know, Your Honor, exactly what PJC is
21 saying. And frankly, from the letters that we have gotten
22 from them, it appears they don't know, either. And that
23 really goes to the dispute, here. It is in terms of what
24 PJC knows and is able to disclose to us and is able to
25 verify through a pre-suit investigation, and not based on

1 what a defendant can do by going to a fleet manager and
2 trying to connect the dots that PJC should have connected
3 before bringing its lawsuit.

4 THE HONORABLE JUDGE DONOVAN FRANK: All right.
5 Let me hear from the other Defendants first, and so we get a
6 picture before we take a short -- we will take 10 minutes
7 and then finish up. Go ahead.

8 THE HONORABLE MAGISTRATE JUDGE RAU: Mr. Hill?

9 MR. HILL: Thank you, Your Honor. I am going to
10 try to --

11 THE HONORABLE MAGISTRATE JUDGE RAU: Come a little
12 closer to the microphone.

13 THE HONORABLE JUDGE DONOVAN FRANK: Yeah, that is
14 not one of those fancy entertainment mikes.

15 MR. HILL: How is that, better?

16 THE HONORABLE JUDGE DONOVAN FRANK: There you go.

17 MR. HILL: Okay. I am going to try to raise a
18 couple of additional points, rather than restating the
19 points that have already been made. I see a chicken in the
20 egg problem here, as well, but the way that my clients see
21 the chicken and the egg is, who goes first?

22 Does the plaintiff who brings the case have to
23 provide infringement disclosures where they at least
24 functionally describe on an element by element issue what it
25 is that they are seeing, or what it is that they claim they

1 can see inside of a given defendant's systems that gives
2 rise to the belief at the outset of the case that there is
3 infringement?

4 There is utility to providing that before going
5 into discovery in the case, which is why the Northern
6 District of California's Local Patent Rules, the Northern
7 District of Georgia's Local Patent Rules and every other set
8 of standardized Local Patent Rules that I have been able to
9 find sets forth as Rule 3-1, that the infringement
10 disclosures are to be provided with as much specificity as
11 the plaintiff can muster, given what they know.

12 At that point in time Local Rule 3-2 then provides
13 that in response to that, we have to provide them with
14 discovery on the specifically identified systems. Whether
15 those systems are identified by their manufacturer name or
16 by an adequate functional description of how the system
17 operates.

18 Now, why does this matter? I listen to the
19 Plaintiff's counsel describe that they know how the systems
20 work, they are just not sure which manufacturer the
21 Defendants are using. But, that leaves as a gaping hole the
22 question of whether or not the Defendants are using a
23 third-party manufactured system at all.

24 So, a functional description on an
25 element-by-element basis can at least frame the issue and

1 allow these Defendants to go back and query with their
2 clients and we don't -- it's not a get out of jail free card
3 for the Defendants, because as I understand the way the rule
4 works on this Court's forum, we have to come back and tell
5 them whether we have that or not. But, our point is that we
6 think that the Plaintiff brought this case. The Plaintiff
7 should have to go first. And for those Defendants who are
8 concerned about the adequacy of the pre-filing
9 investigation, the only way to be able to test that is in a
10 true fashion having done patent infringement litigation for
11 the better part of the last 15 years is to be able to see
12 what those infringement disclosures look like before the
13 Plaintiff can dive into the Defendants own documents and
14 conduct discovery in the case. Because once that happens,
15 infringement contentions may change. And if they are going
16 to change, that is how it needs to play out in the
17 litigation. They need to ask the Court for permission to
18 change their infringement contentions. That is valuable in
19 and of itself for the Defendants that wish to raise the
20 adequacy of the pre-filing investigation. My clients
21 haven't made any determination whether or not to test the
22 Rule 11 issue because we don't have enough information to
23 know one way or the other. We've heard some new things
24 today from Mr. Farney, and I am willing to take him at his
25 word regarding some of the things that they claim to have

1 done. But, all we have heard to this point in the written
2 exchanges is the phrase fleet management system. Well,
3 fleet management system for my client Ryder means a whole
4 lot of different things. They have one division, for
5 example, that uses 12 different systems that could arguably
6 be described as fleet management systems. Some of that code
7 was written in-house, some of it was acquired from third
8 parties. But, it is very difficult and I mentioned this
9 30 days ago when --

10 THE HONORABLE JUDGE DONOVAN FRANK: When you asked
11 for the letter, the January 20th letter.

12 MR. WILLIAMSON: Yeah, I was the one that
13 originally raised the question of getting a more adequate
14 explanation of what claims or and what kinds of systems we
15 are really talking about here.

16 Having now seen the letter that basically says you
17 either do this or you do this, meaning this manufacturer's
18 system or this manufacturer's system, or you have an
19 internal system. To a company like Ryder, that is as much
20 as saying, go figure it out. You are a smart guy. We don't
21 think that we should have to figure it out in the first
22 case. We think that they owe us adequate disclosures on an
23 element-by-element basis. We think that the patents require
24 a little bit more in terms of the claim elements than the
25 simplified view that has been portrayed of the systems which

1 arguably would infringe today.

2 We want to know what functionally they think we
3 have that is meeting this description of the claims. And
4 that would dramatically expedite our ability to go to the
5 client, research this, get back to the Plaintiffs either by
6 entering into settlement negotiations or responding that,
7 hey, we don't have them. You are wrong on your supposition
8 regarding the settlement. We don't have that.

9 THE HONORABLE JUDGE DONOVAN FRANK: Any other
10 defendant, before we -- want to jump in on this issue?

11 Let's take a ten-minute recess. We will come back
12 here. If I cut off a Defendant, a brief response from the
13 Plaintiff on this issue, and then what we will promise you
14 is that with or without additional submissions, whether you
15 all agree it is chicken or the egg, we will decide what is
16 going to go first with appropriate input from you in the
17 next couple of weeks, if not before. So, we are going to
18 get this issue resolved so that -- and then I guess we will
19 see if -- regardless of which comes first -- if it does
20 resolve some of the issues or some of the parties, go on
21 their way separate from whether some of you are
22 contemplating Rule 11 issues.

23 So, we will see you back in 10 minutes and then we
24 will finish up. We will leave off here and go right
25 through, and finish off before noon. All right? We are in

1 recess.

2 (Discussion off the record.)

3 (Recess.)

4 THE HONORABLE JUDGE DONOVAN FRANK: You may all be
5 seated. Thank you. Before I hear a brief response from
6 Plaintiff, Mr. Williams?

7 MR. WILLIAMS: Your Honor, a couple of things real
8 briefly. First, the two dates the Court proposed March 22nd
9 and April 12 --

10 THE HONORABLE JUDGE DONOVAN FRANK: They are bust?

11 MR. WILLIAMS: All those are good. Everybody
12 agreed that they --

13 THE HONORABLE MAGISTRATE JUDGE RAU: Too early or
14 too late?

15 THE HONORABLE JUDGE DONOVAN FRANK: Well, I would
16 lean towards the earlier date unless -- I interrupted you.
17 So maybe you were going to tell us too late or too early.

18 MR. WILLIAMS: It's an up.

19 THE HONORABLE JUDGE DONOVAN FRANK: And then what
20 we will do is, I will make it clear in the Order, but make
21 it clear today and it was my fault we didn't before.
22 Depending on people's flights and depending on who all is
23 going to be here, if we meet -- we have two options. We can
24 meet at 8:30 to 9:30 in chambers or we can do it 9:00 to
25 10:00, with the understanding we will come to the courtroom.

1 Not that we -- if we need the full hour back there, fine.
2 But in fairness to anybody who would be coming, because it
3 won't be open to the public back in chambers, and depending
4 on how many people are here, we will either use my chambers
5 or the major conference room for the whole building is right
6 next to my chambers.

7 So, we will have plenty of room, that won't be the
8 issue. It can be 8:30 or 9:00, set aside an hour. I can do
9 either. If somebody is saying, well, it really makes it --
10 we would prefer nine, so if somebody flies in here early in
11 the morning.

12 MR. WILLIAMS: Your Honor, I think that also helps
13 us have some time. We met this morning for coffee in
14 advance, so if we could do a 9:00 start --

15 THE HONORABLE JUDGE DONOVAN FRANK: 9:00 it is.

16 MR. WILLIAMS: That gives us a chance to get
17 together. If I bought the coffee this morning, I am hoping
18 somebody else will get it next time.

19 THE HONORABLE JUDGE DONOVAN FRANK: Well, and I
20 can tell you, I will have coffee ready for you back in
21 chambers. So, you can get that early morning buzz for those
22 of you that need that caffeine. So --

23 MR. FARNEY: Plaintiff would like to suggest decaf
24 for the Defendants.

25 THE HONORABLE JUDGE DONOVAN FRANK: So, you are

1 going to drink -- which are you going to drink? You want
2 them to drink decaf and vice-versa?

3 MR. FARNEY: I will be willing to do the same.

4 THE HONORABLE JUDGE DONOVAN FRANK: We will have
5 both.

6 MR. WILLIAMS: Second, Your Honor, we thought it
7 would be beneficial for the Court if the parties were to
8 submit to you within a week short letter briefs to this
9 issue that we have been discussing about earlier today that
10 could help guide you?

11 THE HONORABLE JUDGE DONOVAN FRANK: And that I
12 think would be -- here is what we had discussed over the
13 break, and I think I implied it before we went out. But,
14 that is perfectly fine. That would make sense. And what I
15 would agree to do, probably with the two or three-day
16 turnaround time, unless I feel I need more information,
17 would make a response on -- now we are talking about the
18 chicken and the egg issue as it has been described, not the
19 disqualification issue.

20 I was going to suggest, but this probably is
21 better, unless there is some reason the Plaintiff objects,
22 that along with a proposed -- both what is agreed and what
23 not, within two weeks the 26(f) report so we can generate an
24 order, either off the bench or right around that date when
25 you come back in March, unless the issues to be decided --

1 we can cut the Order and leave an issue or two for that
2 date.

3 I was going to say, submit your response to this
4 on that date. But you know what? If it comes in a week, I
5 will have an order turned around on that limited issue
6 within a couple of days. So, we can get down the road on
7 that issue that I think will benefit both parties in terms
8 of who steps first. Is that acceptable to the Plaintiff, as
9 well, that timeline?

10 MR. FARNEY: I believe so. So, we are going to
11 submit a letter brief on the question of how we proceed on
12 it?

13 THE HONORABLE JUDGE DONOVAN FRANK: Yeah, on what
14 the issues we have been discussing about. And then I will
15 agree, absent some compelling reason that I see in the
16 letter, that we discuss, and I can't imagine what that would
17 be, I would then agree today that once I see those, and in
18 the highly unlikely event that we decided that we needed
19 additional information to make the decision, we would pick
20 up the phone and have a very short telephone conference with
21 a couple of you. That is really not going to happen.
22 Because what I envision is that what we discussed is, get
23 the response, and then I will do an Order within a couple of
24 days after receipt of those. So, we won't wait for March
25 12th on that issue because I don't think that would benefit

1 either one of you. So, all right?

2 So that takes care of that, so -- not to
3 oversimplify the issue, but I think that will resolve it.
4 And then you have got a record, each of you, of where you
5 stand with that issue.

6 Now, does Coca-Cola want to be heard on the issue
7 of the 12(b)(6)? Or does anyone else want to be heard on
8 that issue? I guess it wasn't -- are we going to stand down
9 on that for a short time?

10 MR. LEE: Yes, Your Honor. We filed motions on
11 behalf of Coca-Cola and the two U.P.S. entities.

12 THE HONORABLE JUDGE DONOVAN FRANK: Yes.

13 MR. LEE: We don't want to unnecessarily make them
14 file briefs, you know, or something, like I said. I think
15 the way it was -- where it was left is we filed our initial
16 briefs. It had been calendared, for a calendar, for a
17 hearing, but they had not responded because the response had
18 not come up yet.

19 And so, if we can, again, our whole goal was to
20 get down this path and get what we need to get without
21 unnecessary work. And if we can get there, we think it is
22 appropriate to hold them for now.

23 We may, like I said, we just learned this new
24 additional information. We are going to go to our clients.
25 We may ask at some point that they amend their Complaint to

1 provide whatever detail they have, but it goes to the
2 disclosure issue. If we get what we get, we are not going
3 to stand on the pro forma of these motions if we get where
4 we need to get.

5 THE HONORABLE JUDGE DONOVAN FRANK: Well, and
6 generally, sometimes the Court walks a fine line, but it
7 isn't such a fine line with good experienced lawyers of --
8 the easier, in some cases, not unique to MDLs, the easier
9 access and quick access to a Judge or Magistrate Judge, or
10 both of us, sometimes say, well you become the enabler when
11 you do that rather than the lawyers talking to each other
12 you just -- that doesn't really happen. My point is, if
13 things change, whether it is from the Defendants' point of
14 view or the Plaintiffs you don't have to wait until the next
15 hearing once we get a system set up apart from this issue
16 about putting things on the agenda with notice by a simple
17 letter without formal motion practice. I think that is
18 going to suit everybody's purposes.

19 But, generally, we will try to make ourself
20 accessible. If we seem to be resolving something, as
21 opposed to, well, what is really happening is people stop
22 talking to each other, they just call the Judge. And so
23 then of course that would defeat the purpose. And that
24 usually doesn't happen. So, it seems like, and I saw a nod
25 from the Plaintiff's counsel. Mr. Cunningham?

1 MR. CUNNINGHAM: This is on a similar, similar
2 issue, Your Honor.

3 THE HONORABLE JUDGE DONOVAN FRANK: All right.

4 MR. CUNNINGHAM: PJC filed a motion to dismiss the
5 affirmative defenses and counterclaim of General Motors in
6 the Delaware case and since that has been transferred, I
7 guess that is now before you.

8 THE HONORABLE JUDGE DONOVAN FRANK: All right.

9 MR. CUNNINGHAM: I don't know what the briefing
10 schedule would be. I would hope honestly that they would
11 reconsider and drop it. The issue is that we didn't plead
12 our affirmative defenses of invalidity, Laches and estoppel,
13 and our counterclaim of invalidity with particularity, which
14 I think is ironic, considering their pleading. But that
15 said, I have done a survey of probably 20 to 25 of the
16 answers of the other Defendants filed in this case, as well
17 as asking defense counsel, and every single one of them pled
18 the exact same thing I did. And not one motion to dismiss
19 was filed on any of those.

20 So, I don't know why their pleadings would be
21 adequate, but GM's wouldn't. But, that is something I guess
22 that we will have to put on your calendar for briefing.

23 MR. FARNEY: I can speak to that.

24 THE HONORABLE JUDGE DONOVAN FRANK: All right.

25 MR. FARNEY: That is because GM got the reasonable

1 counsel for PJC out of the case. The other parties, we
2 weren't going to go into nonsense like that. And just if
3 they've got their pleading, we will figure out what their
4 Laches positions are later. GM got us out of the case and
5 PJC got other counsel who took a different view of how to
6 handle that matter.

7 THE HONORABLE JUDGE DONOVAN FRANK: Can we deal
8 with the -- for lack of a better word, stand down on that
9 issue temporarily until we see where the disqualification
10 issue is going to go, and then if it doesn't go where you
11 people want it to go, we may have to hear all of that stuff
12 together, one maybe preceding the other.

13 MR. FARNEY: If Mr. Cunningham will let me speak
14 for PJC Logistics in a matter related to GM, I will do that.
15 But I don't want to get him all upset and do that without
16 his consent.

17 MR. CUNNINGHAM: And I thank you for that.

18 THE HONORABLE JUDGE DONOVAN FRANK: He doesn't
19 look too upset. Maybe he has got a good poker face.

20 MR. CUNNINGHAM: If it comes to getting a motion
21 withdrawn against my client, that will be fine. As far as
22 tabling it, I am all for that, obviously, for now.

23 THE HONORABLE JUDGE DONOVAN FRANK: I think we
24 should just stand down with the assurance of Plaintiff
25 saying, well, if the worst happens, if we could have just

1 had this heard before the disqualification, we will do it in
2 some fair order. As a footnote of this, it is probably the
3 furthest thing from anybody's concern, the whole *Iqbal* and
4 *Twombly* thing and affirmative defenses, and the
5 applicability of those cases to affirmative defenses, in
6 one minute or less I will just tell you, one Judge in our
7 District -- I am not the Judge. Judge Montgomery has ruled
8 that they apply to affirmative defenses. All of the rest of
9 us have said, no, they don't. And the Eighth Circuit has
10 not ruled, but I have ruled two or three times that it does
11 not apply to affirmative defenses. But, that is probably
12 the furthest thing from everybody's concern right now.

13 MR. FARNEY: I can speak for -- I think I am
14 allowed to speak for PJC and say we are happy with it being
15 stand down for now, and frankly probably withdraw, but stand
16 down for now.

17 THE HONORABLE JUDGE DONOVAN FRANK: All right.

18 THE HONORABLE MAGISTRATE JUDGE RAU: Thank you.

19 THE HONORABLE JUDGE DONOVAN FRANK: Thank you.

20 Well, I think that unless I have -- why don't we agree on a
21 date before I move on on the 26(f) report, separate from the
22 submissions on the chicken and the egg issue. If we took
23 two weeks from Friday, that would be -- if I can get a
24 calendar in front of me -- let's see, the 3rd --

25 MR. WILLIAMS: That would be the 17th, Your Honor.

1 THE HONORABLE JUDGE DONOVAN FRANK: Would that be
2 acceptable by noon on that date? It would be two weeks from
3 Friday. What we get is proposed 26(f) reports, so that if
4 all of the Defendants agreed on one, and the Plaintiffs did,
5 so much the better.

6 I don't think that will happen. And so that as
7 long as we know, here is what we agree on, here is what we
8 do not. And depending upon what the nature of the
9 disagreements are, but we would give you notice first. We
10 would either cut an order, but more likely sit tight until
11 March 12th, unless we look and say, well, let's move some of
12 these things along. But, we would let you know depending
13 upon what the nature of the conflict of this agreement is.
14 That is what we will do with that. And I will put that in
15 the Order, as well. But, it will reflect what we did here,
16 so there can be no -- did you want to say something about
17 that, Your Honor?

18 THE HONORABLE MAGISTRATE JUDGE RAU: Yeah, as I
19 said, I would like it if you attached to the Rule 26(f)
20 report your addendum that borrows from Guidant how you would
21 like to informally submit --

22 THE HONORABLE JUDGE DONOVAN FRANK: And you know
23 what I will do is I will -- even though you can get it on
24 line, I will locate in the numerous orders -- it is a rather
25 cumbersome process looking at the -- it is on our website.

1 And I put -- by the way, this case is now up on our website,
2 as well. It is in this developing stage. But, it is up
3 there. If you go under MDLs, you will see this case on our
4 website and our IT people got it up, I think, about a week
5 ago. But, I will send to attach to the Order that comes
6 out, that Order where we set up this kind of, for lack of a
7 better word, informal process. It seemed to work very well.

8 Nobody complained we were cutting corners or
9 trampling on the rules, but I will send that with the Order
10 that will go out. So --

11 MR. FARNEY: Your Honor, I want to make sure I
12 understood the five-page letter brief I am going to do on
13 the chicken and egg.

14 THE HONORABLE JUDGE DONOVAN FRANK: One week.

15 MR. FARNEY: One week, not with the 26(f) --

16 THE HONORABLE JUDGE DONOVAN FRANK: And that way
17 it seems like a good suggestion, unless there was something
18 there that would seem to indicate it wouldn't be appropriate
19 and fair for all parties concerned to respond to it with an
20 immediate turnaround Order by the Court, that is what we
21 will do.

22 And if we are going to do anything other than
23 that, Ms. Schaffer, my calendar clerk, will ring you up and
24 say, with or without objection, we either want more
25 information or we are going to sit tight until March 12th.

1 I don't believe that is what -- you won't get that call. We
2 will get that in a week, and then the 26(f) issues will come
3 two weeks from Friday.

4 MR. FARNEY: I would like to make one more
5 proposal.

6 THE HONORABLE JUDGE DONOVAN FRANK: All right.

7 MR. FARNEY: If it is possible, I would like to
8 see if we could ask GM's counsel to decide, to let us know
9 in a week whether they are going to seek disqualification.

10 THE HONORABLE JUDGE DONOVAN FRANK: I think he
11 said he agreed to two weeks. We will see if he can do it in
12 a week.

13 MR. FARNEY: I was going to add that if they
14 decide they are not going to, which I hope that is what they
15 will decide, what I was going to suggest was then that we
16 would work out with them a suggestion to the Court as to how
17 we would proceed in the MDL and include that in the 26(f)
18 report as to how to handle GM issues. That is why I was
19 suggesting a week --

20 THE HONORABLE JUDGE DONOVAN FRANK: Let's find out
21 what Mr. Cunningham thinks of the idea. Maybe he can't
22 until he has talked to his folks, he can't commit to that.

23 MR. CUNNINGHAM: I think you are right, Your
24 Honor. I can do my best to get this done in a week. I can
25 certainly make an effort, but a lot of that is going to be

1 depending on my client.

2 As an alternative, I certainly discussed with my
3 client maybe some possible ways we could shield it, or if it
4 is feasible, and I will talk with my client about that. And
5 if that is the case, the I will get with Mr. Farney.

6 THE HONORABLE JUDGE DONOVAN FRANK: Let's leave it
7 this way, then, let's say the worst happens, which isn't a
8 very worst case scenario, that it isn't done so you can
9 include that in the 26(f) report in two weeks. If it then
10 happens on the eve of that or something where the two of you
11 could talk between then and March 12th, if you talk and,
12 with or without agreement, you identify the issues and want
13 to submit a short supplement -- it wouldn't be everybody,
14 but a supplement saying, well, now we have the information.
15 We didn't have it when that came in. We will agree to
16 address it, if not before, at that March 12th hearing. Or,
17 if that comes in so it is clear what your respective
18 positions are, we will probably set up a telephone
19 conference, not with everybody, unless they all want to be
20 involved, and say, all right, it looks like it is
21 unavoidable, it looks like we are going to have to set up an
22 expedited hearing. Let's agree on a briefing schedule.

23 If that becomes the scenario somewhere before the
24 12th, we won't wait for the 12th, we will ring you up and
25 see if we can set a schedule, unless you have agreed to

1 something on, well we can't agree on the outcome but we can
2 agree on a schedule to move this along.

3 So, as long as we have things, if I have things
4 three or four days in advance, sometimes lawyers will say,
5 well, how much time do we have to submit the briefing, as
6 long as I have got a weekend, or at least three days, give
7 or take, depending on the nature of it? I will try to work
8 with the lawyers on that. So, all right?

9 MR. CUNNINGHAM: Sounds good.

10 THE HONORABLE JUDGE DONOVAN FRANK: I think, then,
11 that takes us to --

12 MS. MERRIETT: Your Honor?

13 THE HONORABLE JUDGE DONOVAN FRANK: Yes?

14 MS. MERRIETT: Hi. This is Connie Merriett from
15 Farney & Daniels. I wanted to mention one small logistics
16 item. I want to be sure that we are able to be in regular
17 communication with the joint defense group on issues
18 regarding Rule 26. I know they meet on Mondays, and
19 occasionally that slows things down so the communication
20 doesn't occur as frequently with the defense group as we
21 might need to resolve some of these issues. So, I just
22 wanted to mention formally, I would encourage more regular
23 communication when we have to meet and confer on the Rule
24 26, given that the two weeks goes by rather quickly, you
25 know, and they have Monday meetings. And I have found that,

1 you know, I know it is difficult to meet with that many
2 defense counsel and get a response and have everyone agree,
3 but that hopefully we can encourage and facilitate more
4 regular communication when we have upcoming deadlines so
5 that we don't wait until the last minute to hear back from
6 the defense group.

7 THE HONORABLE JUDGE DONOVAN FRANK: I am confident
8 Mr. Williams is going to have it under control. He is
9 nodding his head up and down, not the other way, Counsel.

10 MR. WILLIAMS: Our regular Monday meetings are
11 scheduled, but that doesn't mean we don't talk and
12 communicate by e-mail in advance of that. So, we can move
13 things along.

14 THE HONORABLE JUDGE DONOVAN FRANK: And I doubt
15 that counsel will be bashful at the next hearing or before
16 saying, well we weren't able to work this out because there
17 was no meet and confer, because most lawyers don't like to
18 have to say that to a judge.

19 MR. WILLIAMS: To that end, Your Honor, I think it
20 might help us with the Rule 26(f) if maybe before we got to
21 the 2d on there, if the Court was prepared today to give us
22 some guidance on the idea of damage delay as opposed to
23 bifurcation, I think if we were to have an agreement that
24 that is what we were going to do with this case, then us
25 getting together on a composite 26(f) is going to be much,

1 much easier, because that would then resolve a big chunk of
2 it.

3 THE HONORABLE JUDGE DONOVAN FRANK: In other
4 words, not address -- either stage it so that out of the
5 block you are not going to be exchanging discovery and
6 dealing with issues relating to damages?

7 MR. WILLIAMS: Correct. So, if Your Honor was to
8 say today, yes, I think that would make sense for this case,
9 that will help the parties formulate a single 26(f) report,
10 I think, that will look -- we will be able to get to
11 agreement on most of the other issues.

12 THE HONORABLE JUDGE DONOVAN FRANK: Does the
13 Plaintiff want to be heard on that?

14 MR. FARNEY: Your Honor, I think maybe we can talk
15 about this during the next two weeks. I think we would be
16 agreeable to -- you don't want to use bifurcation, you want
17 to use what, delay --

18 MR. WILLIAMS: Delayification.

19 THE HONORABLE JUDGE DONOVAN FRANK: Delay or stage
20 if you like the "S" word better, the stage.

21 MR. FARNEY: I think we will agree to mostly
22 delayification. We want some pretty specific information
23 pretty narrowly limited earlier, because I think that would
24 be helpful for a lot of purposes. I think we can discuss it
25 and see if we can reach agreement on sort of that narrow --

1 THE HONORABLE JUDGE DONOVAN FRANK: I saw a
2 thumbs-up, but let me give you just a bit of a guidance but
3 maybe you don't need it because of what you both have just
4 said. But, we would approve of what you called it, a
5 delayed or staged process for the -- and then because there
6 is a safety valve for all sides of the runway here, because
7 if the worst happens and you are saying, well now we didn't
8 foresee it coming, but because of the agreement we have with
9 or without the Court defining its scope, there is some
10 discovery we claim we need that is related both to damages
11 and liability and other issues, well then any stipulation
12 can say absent further order of the Court, so that you won't
13 hear the "W" word come out of my mouth. Well, you waived
14 that back when you agreed on that. I won't discuss it with
15 you. I really think we can do it that way. I think a
16 staged, to delayed, or layered approach to this makes some
17 sense until I am convinced otherwise. So --

18 MR. FARNEY: And largely, like I said, we are in
19 agreement with that. What I am mainly talking about is at
20 some point earlier in the discovery getting a sense of how
21 many units we are talking about. For instance, if we are in
22 a situation where there are only 5 or 10 units, you know, we
23 would handle something differently. But not get into things
24 like profit margins, unit prices, all of that more detailed
25 stuff, I think we would be fine with that.

1 THE HONORABLE JUDGE DONOVAN FRANK: Mr. Williams,
2 does that give you enough common ground to see if we can --

3 MR. WILLIAMS: Yes, Your Honor, I think we have
4 made a lot of progress, and we will get there.

5 THE HONORABLE JUDGE DONOVAN FRANK: All right.
6 All right. Move on to 3. Unless I have overlooked
7 something, some of these issues have spilled into 3a and b,
8 and maybe already c, but who -- would the Plaintiff like to
9 be heard on these issues, your proposal, or do you think we
10 are at the point now where we will see if we can agree on
11 something and there is not much more to be said? Or is
12 there something you need us to do at this stage?

13 MR. FARNEY: I think there are just two points,
14 Your Honor.

15 THE HONORABLE JUDGE DONOVAN FRANK: All right.

16 MR. FARNEY: One, and this probably relates to the
17 earlier discussion, without getting into the chicken and egg
18 dispute again or question again, I would like to suggest
19 that the Plaintiff -- we have provided the now list with all
20 of the license manufacturers who have taken a license in the
21 case.

22 We think it is likely that some of the Trucking
23 Defendants don't have anymore units that aren't licensed,
24 but we just don't know. So, our suggestion, at least, would
25 be for you to ask counsel on the Defendants' side before we

1 do the 26(f) report in two weeks, just to check with our
2 clients and let us know, there is no point -- we have no
3 interest in proceeding with someone who is licensed out. We
4 just don't have a full knowledge of what units they are
5 using. We are not asking them to tell us, except if they
6 come back and say, hey, we did check, all of our ones are
7 licensed. We could have a conversation with them to assist
8 in that, I think, I may be surprised, but I think that is
9 going to dismiss out at least several Defendants, and maybe
10 quite a few. So, I don't think we should wait for anybody
11 to do that. That would be at least our suggestion.

12 The second thing, really -- maybe if I could give
13 a response on that first, because my second one is really a
14 different --

15 THE HONORABLE JUDGE DONOVAN FRANK: All right, go
16 right ahead.

17 MR. FARNEY: The second one goes to part 3 of the
18 agenda. And it has to do with the parties agreeing on, in
19 the 26(f) report, a discovery. And the one issue that I saw
20 where I think the parties may be a little different, and I
21 thought maybe getting some guidance from the Court might be
22 helpful.

23 For example, interrogatories, our proposal is that
24 we get a certain number and they get -- they get more and
25 they get some few individualized ones, so they ask us a

1 bunch of common interrogatories, and then they get a few
2 that are specific to them.

3 They have proposed a much broader structure where
4 they get 15 common and 15 per Defendant to us. We have no
5 problem in getting them whatever discovery they are entitled
6 to, and if it is individualized, getting that discovery --
7 but, I have a hard time imagining if we end up with 20
8 trucking companies left, that they need to send 15 common
9 interrogatories and 300 individual interrogatories that are
10 truly asking different information. So, we are willing to
11 give them reasonable limits, reasonable discovery.

12 And if they need more when we come to a limit, we
13 are not going to be difficult about that. But, the way it
14 is proposed now, it sort of invites, frankly, the potential
15 for abuse. We would rather have a report that is a little
16 more limited at the start and then give them more of what
17 they needed. And if we can get some guidance of your views
18 on that, that would be helpful. I think that may be the one
19 we will have a little disagreement on when we are talking in
20 the next two weeks.

21 THE HONORABLE JUDGE DONOVAN FRANK: I think we
22 should -- I haven't let the Defendants be heard, but I think
23 we should see the -- and I will explain why in just a
24 moment, the 26(f) reports without making a decision right
25 now, but just to say the following.

1 Whether -- I think some of this relates back, some
2 of it does not to the chicken and the egg. I think some of
3 these issues come up even without that issue and maybe
4 everybody will get sick of hearing -- let's come up with
5 something other than the chicken and the egg, cart and the
6 horse, or something like that.

7 I think the more information that is exchanged,
8 apart from the issue of who should exchange first, it may --
9 it will tell us how reasonable and necessary it is to have
10 how many additional individualized interrogatories per
11 Defendant once -- and I suspect they may agree. It is just
12 what people don't agree on is who should be providing what
13 to whom first. And we are going to resolve some of that, if
14 not all of that, in the next 7 to 10 days.

15 So, I think maybe people, if you have to act on
16 the information you have at the time the report comes in,
17 because you are a little reluctant to say, well, it is hard
18 to agree to this when we don't know how many individual
19 claims or defenses we will have, depending upon the
20 allegations or defenses, then I guess, say what you have to
21 say, and then -- because I think it is going to become
22 apparent earlier, rather than later, on the reasonableness
23 of some of the individualized approaches to some of this
24 discovery. Some of this is going to spill on to the claim
25 construction issues, maybe, as well, at some point, sooner

1 rather than later.

2 In other words, we are not really asking anybody
3 to stipulate to anything, because sometimes a client will
4 say to their lawyer: You agreed to do what? As opposed to:
5 Well, the Judge said this is the way we are going to do it.
6 So, does the defense want to be heard on that? Until we
7 have had some exchange of information and see what the
8 proposals are, we may need more information. To be fair to
9 both parties, I think we should just play the hand out a bit
10 here. I don't think it will delay things too far.

11 MR. FARNEY: That is fine I just wanted to raise
12 the issues.

13 THE HONORABLE JUDGE DONOVAN FRANK: That is fair
14 enough.

15 MR. WILLIAMS: Your Honor, I think we can resolve
16 a lot of that in the next couple of weeks as we work through
17 that.

18 Backing up, though, to the first point?

19 THE HONORABLE JUDGE DONOVAN FRANK: Yes.

20 MR. WILLIAMS: That I think we would like to deal
21 with in our brief that we would file next week about the
22 chicken and the egg issue about, can we answer at least how
23 much non-Qualcomm stuff -- we will address that in our
24 brief.

25 MR. FARNEY: I wasn't asking them to tell us how

1 much non-Qualcomm stuff, I am simply saying if they will
2 just go check and they have all licensed units, then we
3 ought to drop them out of the case. That was all I was
4 saying. I wasn't trying to get into the chicken and the egg
5 thing, I'm just saying if the reason -- I mean, if there
6 case is dropping out, we are not trying to keep them in.

7 MR. WILLIAMS: Same response.

8 THE HONORABLE JUDGE DONOVAN FRANK: All right. We
9 will see what you have got to say, and then we will go from
10 there.

11 Now, additionally, does the defense want to
12 respond, or the Defendants on -- I guess we are at 3a and
13 about to drift in -- we have drifted into both 3b and c at
14 various points in the hearing, but Mr. Williams?

15 MR. WILLIAMS: As a general view, Your Honor, it
16 is beneficial to all of us to come to a common proposal on
17 any of these issues. It's beneficial to the Defendants,
18 it's beneficial to the Plaintiffs. That is our goal. But,
19 we are at this point unable to come up with saying we are
20 going to be able to do it uniformly and all of that because
21 there are unique issues.

22 THE HONORABLE JUDGE DONOVAN FRANK: I understand.

23 MR. WILLIAMS: On the issues of validity of the
24 patent and claim construction, that lends itself by law to a
25 common, much more of a common approach.

1 THE HONORABLE JUDGE DONOVAN FRANK: I am hopeful
2 of that, yes.

3 MR. WILLIAMS: Well, you know, and it is supposed
4 to work that way and I have a feeling it will. On the
5 infringement side, we need a lot more latitude there because
6 there is a lot of variation, including the folks that have
7 got their own custom stuff that they have had programmers
8 write code to and stuff like that. That doesn't lend itself
9 to that kind of a common sort of approach. As a general
10 rule, we will try to do it as much as we possibly can,
11 because it is beneficial to all of us.

12 THE HONORABLE JUDGE DONOVAN FRANK: Well, and I
13 will say, whether this requires more involvement by us than
14 in the normal case, so be it. But, I think because in the
15 MDL context, you know, even though it may be that a patent
16 case in the true sense of the word doesn't lend itself, and
17 some people will say, so, how exactly did this get MDL'd on
18 claim construction issues? But, what I will say is I think
19 the more -- whether it is by Court decision with input from
20 the lawyers or stipulations or a combination, I think the
21 more we can get an exchange of information, whether we have
22 to limit its scope or not, I think that maybe we can
23 resolve, if not all, we can narrow some of these
24 infringement and claim construction issues which in theory
25 could benefit each party as long as people don't feel they

1 have been thrown into a pool to say we have a right to our
2 own individual claims, which is true.

3 But, I am hoping that we can sort some of this out
4 earlier, rather than later, because if that happens, unless
5 I am totally naive or off point, it should hopefully benefit
6 every party. And hopefully nobody is saying, well, we got
7 swept into this and now we want to stand alone and have our
8 own defense. I mean, I am not trying to cut that off, but
9 we want to work with you and see if we can try and rule out
10 some of these issues early on in the case. That may be more
11 of our involvement, say, than we ordinarily would have.

12 MR. WILLIAMS: And we are definitely in agreement
13 as to the spirit of that. Our only issue is that we will
14 need to have the flexibility to have somebody who absolutely
15 feels strongly about a particular unique point that they
16 have got, and maybe it is because they have a brand new
17 summer clerk that they are recruiting from Harvard and they
18 are insistent -- you know, that is the best I can do
19 sometimes. But collectively, thus far, we have done pretty
20 good. Our caucuses worked well. We have even been able to
21 count all of our ballots and we don't have any issues there,
22 so it is working well at this point. But, we still have
23 some folks that their clients have unique needs and unique
24 positions that will require flexibility from a hard and fast
25 rule.

1 THE HONORABLE JUDGE DONOVAN FRANK: And our
2 commitment to everyone is we will keep our pulse on it so
3 that if you need some fairly immediate response -- and with
4 this background, we will look very careful with much
5 scrutiny without depriving anybody of their fair day in
6 court on trying to control the scope of the discovery,
7 whether it is the number of times someone is deposed or the
8 length, or the number of interrogatories, or the scope. We
9 just -- I think the MDL Panel contemplates that we work with
10 you on that and be very vigilant, and we will do just that.
11 So --

12 MR. WILLIAMS: Anything else on that point, on the
13 general issues? I think that speaks to our overriding
14 thoughts on how we would handle all of those points, Your
15 Honor.

16 THE HONORABLE JUDGE DONOVAN FRANK: Because
17 frankly speaking, whether it turns out to be in some degree
18 premature or not, perhaps not, when we get these 26(f)
19 proposed reports, I mean, I think we will know, and then
20 with or without some additional guidance from the Court, we
21 will know early on just what the important issues are that
22 you need us to decide as soon as possible, or well, without
23 this discovery, we can't agree on this or with this.
24 Obviously, one thing that jumped off the agenda, as we
25 talked about it earlier this morning, before we came in,

1 wasn't so much some of the -- for lack of a better word, the
2 garden variety of discovery issues, because even in the
3 Guidant case it wasn't unusual for me to get a call during
4 the middle of a deposition in Texas from counsel. And we
5 would, either myself or Judge Boylan would always make
6 ourselves available.

7 But, one thing that jumped out unique to, I think
8 a patent case is, you know, the issue of well each defendant
9 needs the ability to depose witnesses for facts. Each has
10 its own validity, claim construction, infringement -- I
11 think that is the issue we will soon find out, and hopefully
12 there will be, in everyone's interest, some issues in common
13 so that we can put some scope on this.

14 It is premature now on, well, if we don't get some
15 of this settled early on, what is this *Markman* hearing going
16 to look like from each of your points of view? And in our
17 District, I think we have copied some other districts, but
18 we have been lobbied appropriately by the Patent Bar in our
19 District. What we have found useful, this is chicken before
20 the egg, speaking of that phrase, but a pre-*Markman* hearing
21 discussing with the lawyers separate from a tutorial issue
22 that may or may not be necessary to discuss the scope of
23 things. And even if it relates to discovery issues has been
24 very helpful.

25 And I think the Patent Bar here to their credit,

1 because we have a separate Patent Practice Committee has
2 urged us to do that and I know I have done it in every case
3 for the last couple of years. Well, there are some stop gap
4 measures here that may benefit everyone. So, we will just
5 see -- the other thing, I will sit tight until the end of
6 the hearing. Judge Rau, do you have anything on that?

7 THE HONORABLE MAGISTRATE JUDGE RAU: No.

8 MR. WILLIAMS: The last point, Your Honor, on
9 scheduling like that where it does get to be more tricky to
10 get a common piece done is in the depositions.

11 THE HONORABLE JUDGE DONOVAN FRANK: Yes.

12 MR. WILLIAMS: And what I have found in a number
13 of these that I have done is that if you have -- I mean,
14 obviously if you have 30 defendants, you know, you can't go
15 in there and depose the inventor for 30 days.

16 THE HONORABLE JUDGE DONOVAN FRANK: True.

17 MR. WILLIAMS: On the other hand, you just simply
18 cannot get everything covered for all of those people that
19 they want to get covered in a single day that the Rules
20 would otherwise permit.

21 What we are going to propose is that we have one
22 where we have a certain number of hours, perhaps 8 hours for
23 a common one, and maybe 16 total for everybody else for
24 individuals, or up to that point in time. But, we will need
25 to have some additional --

1 THE HONORABLE JUDGE DONOVAN FRANK: I am going to
2 see in this these cases, and we will deal with making sure
3 everybody on all sides gets input. Because in the event you
4 don't agree on some of those things, and that is likely to
5 happen, we will just make sure we will make a decision
6 quickly.

7 Those are issues that come up in every case,
8 especially this MDL case.

9 MR. WILLIAMS: And in dealing with a patent case
10 where somebody says, all I have got is six questions. Would
11 you ask these six questions for me? And it took an hour and
12 15 minutes just for the six questions. So, it is one where
13 we will work very hard to try to make that a small number,
14 but we will need some help with those depositions, as well.

15 THE HONORABLE JUDGE DONOVAN FRANK: Is there
16 anything left on 3 that either one of you would like to --
17 and you say, what do you mean is there anything left? We
18 have all sorts of things we need to get in front of you
19 before I move on to the remainder. For Plaintiff, first?

20 MR. FARNEY: I don't think so, Your Honor.

21 THE HONORABLE JUDGE DONOVAN FRANK: Mr. Anderson?

22 MR. ANDERSON: I was going to step out of being,
23 sitting, trying to look pretty. Just to clarify, on the
24 Rule 26(f) for everyone's benefit, do Your Honors want one
25 joint report? Or do you want a, here is the Plaintiffs,

1 here is the Defendants? Or do you want, here is what
2 everyone agrees on; and here is the Plaintiffs, what they
3 disagree on; and here is the Defendants and what they
4 disagree on?

5 THE HONORABLE JUDGE DONOVAN FRANK: The latter,
6 that is the latter.

7 MR. ANDERSON: Three.

8 THE HONORABLE MAGISTRATE JUDGE RAU: Door number
9 three.

10 THE HONORABLE JUDGE DONOVAN FRANK: Yeah, door
11 number three.

12 MR. ANDERSON: And the other thing is, I thought
13 that the next status conference was the 22nd. You mentioned
14 the 12th a couple of times. It is March 22nd, correct?

15 THE HONORABLE JUDGE DONOVAN FRANK: Yeah, I am
16 sorry. You may have been right. Did you just say as you
17 came to the mike, you are going to do something other than
18 be pretty, is that what I heard you say?

19 MR. ANDERSON: Yes, sir, I did.

20 THE HONORABLE JUDGE DONOVAN FRANK: I am sure that
21 will be repeated somewhere by a lawyer.

22 MR. ANDERSON: I am certain. And the other thing
23 I wanted to talk about sometime with you was a hearing we
24 had where somehow we got on to the topic of shooting rats at
25 the dump.

1 THE HONORABLE JUDGE DONOVAN FRANK: Yes.

2 MR. ANDERSON: And I can't remember how that came
3 up other than I mentioned that my father took my mother on
4 dates to shoot rats at the dump during the Depression.

5 THE HONORABLE JUDGE DONOVAN FRANK: I did it in my
6 little home farm town I grew up in in southern Minnesota.
7 That is what I did with my father, I recall. But yes, I
8 did.

9 MR. ANDERSON: At least now you will remember the
10 context.

11 THE HONORABLE JUDGE DONOVAN FRANK: Yes. Mr.
12 Williams?

13 MR. WILLIAMS: One thing I was just reminded of,
14 Your Honor, we have on our proposal, and the Court will see
15 this and we have circulated it. We wanted to give you a
16 heads-up on this. The Federal Circuit has their new E
17 Discovery Rules they have propounded. We have looked at
18 that and proposed we will follow that in this case.

19 THE HONORABLE JUDGE DONOVAN FRANK: Good.

20 MR. WILLIAMS: We will address that with them, but
21 that is going to be one that I think will, for better or
22 worse, it gives us a good starting point as to what we
23 should do with it. We proposed it and we will discuss it
24 with them.

25 THE HONORABLE JUDGE DONOVAN FRANK: And I think

1 that is a hot topic all over the country these days, as well
2 as it should be because of the cost and protocol and other
3 issues. So --

4 MR. FARNEY: We will take a look at it. They
5 might find with the limited amount of discovery we are going
6 to want, they may find it is not necessary to worry about
7 it.

8 THE HONORABLE JUDGE DONOVAN FRANK: All right.
9 Are there comments, whether it comes from the Plaintiff's
10 side of the aisle or the Defendants on the -- do they want
11 to put anything on the record in light of the letter briefs
12 we will be getting and the January summary letters and
13 January 30 supplemental letters? Or have we been there,
14 done that?

15 MR. FARNEY: I think we have covered that.

16 THE HONORABLE JUDGE DONOVAN FRANK: Mr. Williams?
17 Assuming you can speak for the rest of the group?

18 MR. WILLIAMS: We have covered that.

19 THE HONORABLE JUDGE DONOVAN FRANK: Let me give
20 you an update. I won't wait until the next status
21 conference. I have exchanged -- that doesn't mean there is
22 any disagreement. I have exchanged e-mails and talked with
23 Judge Lynn, and basically my approach has been I showed her
24 a copy of the order separate from the tag-along case that
25 she has, to say, well, I promised the lawyers that, as you

1 can see in the Order, we would discuss it and work something
2 out on both, the seal issue, what was sealed and not sealed,
3 and what we can make available with the appropriate
4 Protective Order for this case from the case that she had,
5 and separate from the tag-along case.

6 And as soon as we have resolved that, she is on
7 vacation this week, but we have been chatting, and I don't
8 think it is speaking out of school to say she was going to
9 have one of her law clerks get everything in one place
10 there. I suspect we will have that resolved this next week.
11 And then I will let you know either in a letter or a
12 suggestion for -- or unless it takes a separate order from
13 me. Anyway, we will have that resolved as part of the Rule
14 26(f) process. I think we will have that, the Judge and I
15 will have that done before -- in the next couple of weeks,
16 probably next week. That is kind of our timeline now.

17 So, if there is any fault in the delay, she and I
18 just began talking this past week, and that is my doing, not
19 hers, because she did return my call and my e-mail right
20 away. So, that is where that is at. And I don't anticipate
21 any problems. As to what is going to happen with her case,
22 that's was kind of a secondary issue.

23 We have the March 22nd, you are correct, I did say
24 the 12th. And that will be at 9:00 a.m.. We will begin in
25 chambers. I will reduce all of this to an order. We do not

1 typically -- and I will have one other topic to discuss with
2 you, or we will discuss with you, briefly.

3 Typically, it wouldn't be my intent, absent some
4 compelling reason to do otherwise, to connect people in by
5 phone that day. And so whether we begin in my chambers or
6 the conference room next to it, we will begin back here.
7 And then I will in the mean time, of course, you know we
8 will be submitting to you with this Order, I will pull out
9 the *Guidant* Order.

10 One size doesn't fit all, but show you the
11 procedure we had set up in getting things on to an agenda
12 each time we get together. And the way it will worked, we
13 won't -- obviously, if the lawyers generally agree there is
14 no reason to get together for a particular thing, everything
15 has been resolved, or there is something that can be decided
16 without the status conference. We won't have it just to say
17 we had it. But, we can take that as it comes.

18 The other issue that I would discuss, and I would
19 discuss it with you very briefly, even if it isn't one of
20 the main issues discussed at the annual MDL conference down
21 at the Breakers, along with attorney fees and common benefit
22 issues and the like is the notion that the Court should be
23 involved earlier and more meaningfully in any interest shown
24 by the parties for a partial or global settlement to be and
25 make ourselves available.

1 Now, in our District that means, and we won't do
2 it any differently, and we haven't for even MDLs. I think
3 to the benefit of all of the parties. Some people suggest
4 we under-utilize Special Masters in our District. I would
5 suggest that not only isn't that true, but perhaps some
6 districts over-utilize them and pass the costs on to the
7 parties, but reasonable people differ on these topics.

8 What we have done in our District, I don't need
9 any signs from anyone today, or hence. We will make
10 ourselves available, which will be primarily His Honor,
11 Judge Rau, for settlement discussions.

12 In the *Guidant* case and *Medtronic* cases, what we
13 did there was by agreement of the parties, I didn't force
14 the issue. And in addition to Magistrate Judge Boylan who
15 was involved and did primarily -- his primary involvement in
16 both cases was the settlement piece. And they decided to
17 agree on, in *Guidant*, in addition to Judge Boylan, a
18 separate -- there is one Special Master who they could agree
19 on, a lawyer in New Orleans they could agree on, Pat Juneau
20 who worked out, in my humble opinion very well for
21 everybody, including this Court. And he does a lot of work
22 for Judge Fallon down there, too. But that was the lawyers
23 for the two of them because we had a number of -- because of
24 the way the settlement worked, unlike a case like this,
25 there were a lot of individual settlement requests that

1 could be made outside of the global settlement on, well, we
2 set up a system so this individual plaintiff should be able
3 to ask for more money than what -- and take their case to
4 the Special Master which could either be Judge Boylan or Pat
5 Juneau in that case.

6 We will make ourselves available here, as well. I
7 mean, I am putting it out there. I am not implying
8 anything. I am just saying we will make ourselves available
9 as early as necessary, but I think we aren't going to force
10 the issue at this stage.

11 The other thing I will state that is putting the
12 cart way entirely before the horse, the trends in the MDL's,
13 and I may have mentioned this when we got together the first
14 time, and if I did, I apologize. The trend is the
15 expectation by the MDL Panel, because of some criticisms
16 over the years that, well, the state, the Transferor Judge
17 has the case back three years later, and what has happened
18 in the meantime?

19 Well, the expectation is, which I think is
20 reasonable one by the -- and I did it and I have done it in
21 the *Guidant* case is we agree to take an inner-Circuit
22 assignment if everyone agrees because we can't force
23 ourselves on the lawyers and follow the case back to -- in
24 other words, not here, but follow it back to whether it is
25 Texas, California, to say, since it is that far along, it

1 doesn't really seem fair to bring in a new Judge. And to
2 avoid some of that criticism, what have you been doing the
3 last two or three years? Now we have got all of these
4 *Daubert* motions, we have this issue, that issue. Generally
5 we will volunteer, I think most of us, to follow the case if
6 need be, down the road. Anything else on the settlement
7 piece or anything else you want to bring up to these --

8 THE HONORABLE MAGISTRATE JUDGE RAU: The only
9 thing I'd bring up on the settlement piece is at least based
10 on what I heard so far, that to the extent there are, in
11 particular, trucking companies who want a little help and
12 want out, but just need a push on the Plaintiff a little
13 bit, I have heard from the Plaintiff that he is willing to
14 settle with people. So, I just need to hear from a trucking
15 company if they want me involved, and we can set something
16 up. Okay?

17 THE HONORABLE JUDGE DONOVAN FRANK: And it could
18 be, not to interrupt you, but it could be -- occasionally,
19 this isn't unique to MDLs, a counsel will say, well, it is a
20 little premature because we need this level of discovery for
21 settlement purposes before we can step off of the curb and
22 into the settlement lane.

23 Well, then we should be -- unless we are
24 accomplishing that without knowing it, we should be told
25 that, as well. It is a little more difficult in an MDL

1 case, but not necessarily with an individual party to say,
2 well, if we had this limited information, until we get that,
3 we really aren't going to be talking to our client, or
4 vice-versa about settlement. So, we will make ourselves
5 available. And then if that issue is involved, we should be
6 made aware of it.

7 And in some cases the parties will say, it rarely
8 happens in our District, well we want to do it, but we have
9 agreed on somebody that we want to use, but we will leave
10 that up to counsel.

11 THE HONORABLE MAGISTRATE JUDGE RAU: I would add
12 one more thing.

13 MS. MERRIETT: Your Honor?

14 THE HONORABLE MAGISTRATE JUDGE RAU: Most of you,
15 or at least those of you who practice in this District
16 understand how the Magistrate Judges do settlement
17 conferences. I will work with you on that in this case if
18 there's logistical issues. But, I will also caution you, if
19 someone shows up and they don't really have authority, they
20 will be in trouble.

21 THE HONORABLE JUDGE DONOVAN FRANK: And when we
22 say working together, one option -- this isn't to turn on
23 the green light, but if sometimes that means one or both of
24 us going to another part of the country, that is not -- that
25 is quite commonly done in MDLs, maybe. You know, the irony

1 behind me having this MDL, and frankly speaking I didn't
2 think of it when I got the call, but I had in this courtroom
3 not that long ago, and there is still a very major issue
4 pending on attorney fees. The case is over. I had the
5 *OOIDA* case where Minnesota decided to be the state that
6 would -- the trucking, all of the truckers of America would
7 take on, because the State Patrol decided they wanted to be,
8 try to be a pioneer in fatigue testing. And I thought a
9 little bit about some of what they did and not much about a
10 lot of what they did.

11 It was a court trial here. So, I got familiarized
12 with the trucking industry that way, only it was in the
13 fatigue testing and checkpoints, because they decided to use
14 Minnesota as the test location for those, for that class
15 action lawsuit. That was tried here a couple of years back
16 here by me.

17 But, anything else on behalf of the Plaintiff at
18 this time, either something that has come up today? Or you
19 are frustrated, either if not with the lawyers with the
20 Court, saying we were hoping to get this issue taken care of
21 today or this schedule in place?

22 MS. MERRIETT: Your Honor?

23 THE HONORABLE JUDGE DONOVAN FRANK: Hello?

24 MS. MERRIETT: Yes. This is Connie Merriett. I
25 don't know if you can hear me?

1 THE HONORABLE JUDGE DONOVAN FRANK: We can hear
2 you.

3 MS. MERRIETT: I couldn't find an earlier time to
4 interject. I was trying to speak up. This was from a few
5 issues ago about the March 22nd date for the next status
6 conference. I know the defense counsel all agreed that they
7 were available on that date. I'm not certain what my
8 colleagues on the Plaintiff's side has said about that date.

9 THE HONORABLE JUDGE DONOVAN FRANK: They said they
10 agreed on the date, too.

11 MS. MERRIETT: Oh, they did? Okay. Well, I guess
12 you mentioned earlier in the hearing, that is the family
13 week for me. So, that is right smack dab in the middle of
14 spring breaks for my family and my kids. So, I will attempt
15 to head up there, and I am sure we can have someone be there
16 in person and it won't be a problem. But you had mentioned
17 that out of consideration earlier, but I didn't get a chance
18 to speak out without interrupting the Court. So, I didn't
19 know if there was perhaps an earlier date, you know, the
20 16th, the Friday before, or just after the holiday. But, I
21 don't want to cause any wrinkles, so --

22 THE HONORABLE JUDGE DONOVAN FRANK: I just made an
23 assumption that perhaps you would consult with your
24 co-counsel.

25 MR. FARNEY: I am going to go out on a limb and I

1 think I can convince Ms. Merriett that I can handle it on my
2 own. So, we will just say we will do it on the 22nd.

3 MS. MERRIETT: I wanted to make sure I brought
4 that up.

5 MR. FARNEY: I just have the two points.

6 THE HONORABLE JUDGE DONOVAN FRANK: Anything else,
7 Counsel?

8 THE HONORABLE MAGISTRATE JUDGE RAU: Ms. Merriett?

9 THE HONORABLE JUDGE DONOVAN FRANK: Ms. Merriett?

10 MR. FARNEY: Just two things. One, as to the
11 settlement we would be, of course, happy to have you
12 involved. I will say that we have settled a little over 200
13 of the 240 Defendants. And basically, almost everyone that
14 is engaged in discussions after we have been able to explain
15 to them the facts and the history and what other people have
16 done, we have reached settlements. So, if we can get it
17 engaged, I am very confident we will reach a lot of
18 settlements.

19 And last was a piece of advice to the Court. You
20 mentioned about possibly if you stayed into the case and
21 travelled to other locations, that this is a way for you to
22 escape a Minnesota winter and go down to Texas, I will
23 advise you that this winter, at least from my limited
24 experience, it was colder in Texas than it was here. So, if
25 that was the plan, that may not be a good way to go.

1 THE HONORABLE JUDGE DONOVAN FRANK: Okay.
2 Defendants?

3 MR. WILLIAMS: Nothing? Nothing, Your Honor.
4 March 22nd is blizzard week, you know, for Minnesota. So if
5 we are going to get winter, I am predicting right now
6 March 22nd we get it.

7 THE HONORABLE JUDGE DONOVAN FRANK: Mr. Farney, if
8 your co-counsel feels -- I hate to come across as
9 anti-family, if you will work that out with her -- I try to
10 be sensitive. And I think I would be even if I hadn't been
11 through it with five daughters over the years, myself. So,
12 I understand the issue. But, for now we will leave it set
13 there, and then I will assume there won't be an issue unless
14 somebody raises it. Because it wouldn't be the first time
15 it complicates an MDL for a lawyer to get back to their
16 office and say, oh, here is this big ticket item date that
17 we kind of overlooked. But, I will get an Order out and
18 then I appreciate -- and we will meet --

19 MR. FARNEY: I apologize, Judge, but I won't --

20 THE HONORABLE JUDGE DONOVAN FRANK: And we will
21 meet --

22 MR. FARNEY: You say that and it made me think.

23 THE HONORABLE JUDGE DONOVAN FRANK: It might be
24 easier almost to start in here, not because we will
25 literally start in here, rather than be buzzing back

1 everybody individually, and then Brenda can just bring
2 everybody back on the 22nd to chambers. Yes?

3 MR. FARNEY: There was one thing I meant to ask
4 when I came up and forgot. We had talked about doing this
5 five-page chicken and egg --

6 THE HONORABLE JUDGE DONOVAN FRANK: Yes.

7 MR. FARNEY: -- thing in one week, which I guess
8 would be the following Wednesday. Would it be possible to
9 push that to Friday, instead of Wednesday? I have a
10 complication.

11 THE HONORABLE JUDGE DONOVAN FRANK: Fine. Fine,
12 so it will be a week from Friday, and simultaneous
13 submissions. And then in the event, unlikely or otherwise,
14 that one of you either jump off your chair, and I shouldn't,
15 I suppose, make light of such things, are so upset with
16 something that is in the letter that you feel it is far
17 beyond what was contemplated, before you pick up the phone
18 to ring my chambers to say, I am going to -- well, first of
19 all before you pick up the phone or try to send something in
20 on the assumption that, well, I will send it in with a cover
21 letter saying, I am seeking permission, because most lawyers
22 know if it comes, the Judge is probably going to read it.
23 Call the other counsel and say, I am going to contact the
24 Court, and say, I am requesting permission to extend the
25 immediate response. In the unlikely event that happens,

1 because it does happen occasionally, just use that
2 procedure. And then I will promise a quick turnaround,
3 whether I get everybody on the phone for two minutes or not,
4 that is probably another issue -- probably not. But, if
5 that happens, that is the avenue, the way you should handle
6 it.

7 Well, I appreciate everybody coming in to
8 Minnesota. But, like Mr. Williams has said, this is a very
9 unusual -- and you said, too, it's --

10 MR. FARNEY: Yes.

11 THE HONORABLE JUDGE DONOVAN FRANK: Absent
12 anything further, you will be hearing from me before the
13 22nd with the schedule we have got set up. And we are
14 adjourned. Thank you all. All right?

15 (Adjournment.)

16
17 * * *

18
19 I, Jeanne M. Anderson, certify that the foregoing
20 is a correct transcript from the record of proceedings in
21 the above-entitled matter.

22
23
24 Certified by: s/ Jeanne M. Anderson
25 Jeanne M. Anderson, RMR-RPR
Official Court Reporter